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Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 322, LAW.

THE STANDARD OIL COMPANY OF CLEVELAND, OHIO,
PLAINTIFF IN ERROR,

vs.

GEORGE H. VAN ETTEN,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

LEVI T. GRIFFIN,
Of Counsel.

DETROIT:
FREE PRESS PRINTING HOUSE.
1882.

SUPREME COURT

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THE STANDARD OIL COMPANY OF CLEVELAND, OHIO,
Plaintiff in Error.

vs.

GEORGE H. VAN ETTEN,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

STATEMENT OF CASE.

October 4th, 1873.

J. J. Merritt of Lapeer, Michigan, entered into a contract with the Standard Oil Company of Cleveland, Ohio, for the sale of two million heading, suitable for oil barrels.

January 4th, 1874.

Merritt sold and assigned one-half of said contract to Henry Helme.

April 1st, 1874.

Merritt and Helme, doing business as J. J. Merritt and Company, made a contract with the Oil Company, proposing to assume and continue the contract of October 4th, 1873, subject to certain modifications.

May 29th, 1874.

Second contract between parties last aforesaid, still further modifying former contracts.

August 28th, 1874.

Third contract made between parties last aforesaid, still further modifying former contracts.

January 8th, 1876.

Merritt & Helme assigned all right of action under said contracts to plaintiff.

January 10th, 1876. Suit commenced.

The original contract of October 4th, 1873, provides:

"That J. J. Merritt has this day sold the Standard Oil Company two million (2,000,000) heading, suitable for oil barrels, upon the following terms and conditions, to wit: to be sawed twenty-two inches in length, full one inch thick on sap, and full one-half inch thick on the heart edge; and whenever more than two pieces are required to make a head, the same shall count as two; to be well manufactured, from good, sound, white or burr oak, and to be in every respect a first class, merchantable article; to be delivered on board the cars at Cleveland on or before the first day of March, 1875, subject to count and inspection by the Standard Oil Company, who agree to receive and pay for the same as fast as inspected, at the price of four dollars per thousand."

Subsequently, J. J. Merritt & Co, desiring to receive certain advances before the time agreed upon by the contract of October 4th, it was agreed by the contract of April 1st, 1874, that the heading not then delivered should be piled in some suitable and convenient place, to be agreed upon by the parties, on land in Lapeer under the control of the Oil Company; that Merritt & Co. should furnish a man to count the heading when so piled; that thereupon the heading should become absolutely and unconditionally the property of the Oil Company, and upon a presentation of such certificate of count at the

office of the Oil Company in Cleveland, the company would pay or advance the sum of twenty dollars per thousand by draft on New York.

It was expressly provided in said contract that "all the provisions of the contract first above referred to" (referring to the contract of October 4th, 1873), "in regard to specifications, delivery, price, inspection, culling, and all other things not expressly changed by this contract, are to remain in force, this being a modification of said contract in regard to the particulars herein expressly stated, and made for the benefit and at the request of first parties, and for no other purpose."

Neither the modification last aforesaid, nor any other of the various modifications of the contract of October 4th, are deemed material by the plaintiff in error in considering the legal points involved.

The evidence of plaintiff below tended to show:

That plantiff's assignors commenced the manufacture of said heading, and manufactured most of it in 1874; that after it was manufactured it was piled up on each side of the railroad track, accessible for shipping, upon lands leased by the defendant company; and after modified contract of April 4, 1874, that one Coulter took the contract of loading said heading upon the cars for shipment, and plaintiff's assignors commenced the shipping of said heading by rail in May, 1875, and continued to ship said heading until August; that Coulter, with boys and men in his employ, proceeded to load said heading upon the cars obtained for that purpose, by handing them in, when near enough, and wheeling them to the cars when not near enough to hand in, and as they were handed in they were laid up in piles and counted in the piles four or five together, as the case might be, until 100 pieces were placed in the car, and then a mark was made on the inside of the car, and when 500 had been thus placed a cross mark was made, and thus a tally was kept of the number of pieces loaded in each car. That the loading and shipment of the cars was under the direction

and superintendence of one Innes, employed for that purpose, who kept a count of each car loaded, of the number of the car, the line to which it belonged and the number of pieces in each car, and that the number so kept by him was 391 carloads, and all contained 2,691,660 gross pieces. That the persons who loaded the cars counted the same accurately and kept a correct tally thereof, and at the conlusion of the loading of each car reported the same to Innes, who made an entry in his book, and thus the count of the shipments from Lapeer was kept. Innes produced the book in court from which he gave the number of cars, the number of pieces in each car, and the total number. A number of witnesses were sworn whose testimony all tended to show, directly or indirectly, the correctness and accuracy of this count.

The evidence further tended to show that plaintiff's assignors received from the defendant company an inspection report of the first four carloads sent through by rail, showing heading and culls, as follows:

	Heading.	Culls.
May 24th, 1875	4,132	115
" 25th, "	4,168	29
" " "	8,932	60
" " "	3,936	85

That after said four carloads had been shipped through by rail an arrangement was made by which the rest of the heading was to be shipped from Lapeer to Detroit by rail, a distance of 60 miles, and from thence by vessel to Cleveland; that one cargo contained 81,914 of net heading, and 632 culls had been shipped from Lapeer, and loaded upon the schooner "Maid of the Mist," and an inspection report thereof returned by the defendant company, dated June 12, 1875, showing, among other things, the heading and culls as aforesaid, "And dockage and teaming," $1.50 per thousand. That after the return of the inspection reports for the four carloads, and before the return of the inspection report for the first cargo

the agent of the defendant company, Thomas H. Wheeler, being at Lapeer, told plaintiff's assignors that the Oil Company had only culled one cargo, did not find culls enough to pay them for handling in Cleveland, and that if plaintiff's assignors would continue to cull the same, the Oil Company would not cull any more. The parties talked about inspection, and Wheeler said if plaintiff's assignors continued to cull the same, the balance of the heading should run as the first four cargoes did for matched heading. The plaintiff's assignors agreed that this course should be taken, and no culls were reported in the inspection reports from the defendant company of any cargo except the first cargo of the "Maid of the Mist."

That subsequent to the date of the agreement last aforesaid, Wheeler was at Lapeer occasionally, and saw them loading the cars with the heading; and Helme, being on the witness stand, being asked how the heading he saw compared with that that was shipped on the "Maid of the Mist," answered, under objection, that in his opinion the heading averaged about the same all the way through, and that he had been in the heading business since the year before, and he explained the process of matching, as follows: "A piece of the heading is supposed to be half of the heading. The head is 22 inches in diameter. If it takes three pieces to make the 22 inches in diameter, that counts two pieces. If it takes four pieces, that counts two. If it takes two, it counts two. Whatever it takes to make a head, counts as two pieces." And the witness then stated that before the agreement made with Wheeler aforesaid, four cargoes had been shipped; that according to Innes's report to him, there were in the four cargoes shipped, after the four carloads, 378,966 (878,066?) pieces, and 58 cars. Having been asked to make an estimate of the number of matched heading such a number of gross pieces would produce, the witness said there were 878,066 pieces in the first four cargoes. They (the defendant corporation) returned 283,986 of matched heading. Taking the whole number of pieces at the same proportion, it

would give us a total of 2,021,842 of matched heading, and they returned us exactly 1,750,539, making a difference of 266,303 matched heading, which, at forty dollars a thousand, would be $10,532.12.

Further evidence was offered, arriving at the same estimate of matched heading and of gross pieces, and that the count at Lapeer by plaintiff's assignors was, as to the gross number of pieces shipped. The inspection reports of the defendant company showed the number of matched heading specified under the contract as claimed by defendant corporation, and not the total count of gross pieces.

The witness Helme being upon the stand, certain correspondence was elicited, which appears in the record; the letter of August 16th, 1875, acknowledged receipt of drafts, and continues: "The heading is all shipped; but one car left at Detroit, which will have to go with some of the Merritt staves; wish you to inspect and send the reports of the amount received. It is very necessary to me that it be done this month as I have further payment to make September 1, and if there is anything coming from the Standard Oil Company I shall need it badly. Yours truly, H. HELME."

The defendant company replied under date of August 20, 1875, addressed to Helme at Bay City, Michigan, "Enclosed please find statement J. J. Merritt & Company account to date, showing balance due at $542.54, for which we enclose our draft, No. 3,520, on New York, for like amount. Please acknowledge receipt of draft, and oblige."

The statement enclosed in said letter is marked "Schedule F," and appears in the record on pp. 52, 53, 54 and 55, showing the balance as contained in the letter.

On September 21, 1875, Helme wrote from Bay City to the company as follows: "I shipped you on September 3d from Detroit one car of heading. This time it was culled. Please remit the proceeds, and oblige," to which the defendant com-

pany replied under date of September 25th, 1875, addressed to Helme, of Bay City, "Enclosed please find our draft No. 3820 on New York, to order of J. H. Merritt & Co., for $139.82, as per statement below."

Under date of September 28, 1875, Helme wrote to the defendant company as follows: "Your favor of the 25th instant, enclosing New York draft $139.82, is received."

Helme further testified that upon receipt of the statement marked Schedule F, he made no objections thereto, and had not at any time made any objections thereto to the defendant, either verbally or by letter, nor to the statement contained in the final letter of September 22, 1875. It was conceded that between Cleveland and Lapeer there was a daily mail leaving Lapeer one day and arriving at Cleveland on the next, and the witness Helme testified that he was last in Cleveland at the place of business of the defendant company in August, 1875; that he saw McGregor (the manager, and with whom some correspondence took place); that he said nothing to him about the inaccuracy or incorrectness of the returns; that he said nothing about the accounts not being correct; that he had facilities in his power to figure on it, but he never did it; that each bill of lading that he had received stated so many car loads of heading and gave the name of the boat and the number of car loads on each boat; that he received bills of lading of S. W. Thompson, Jr., of Detroit, and that he knew the number of cars that went on each vessel by the bills of lading, and knew the whole number of cars shipped from Detroit. He further stated that previous to writing the letter dated August 7, 1875, he had figured occasionally upon returns furnished by the defendant corporation, and knew that they were not holding out as they ought to. That the said company had never reported to him any gross amount of the pieces received by it, and he had no knowledge of the number of gross pieces which the defendant made by its count in Cleveland, until it was given in court on a former trial, nor did the defendant company ever notify him or give him any information in any manner as to how it was,

by its count, matching the heading; that he had never known until on the former trial of the case how many gross pieces by its matching it took to make a head. He further stated that some time after the receipt of the bill giving the general statement of the account he became satisfied that the defendant had not accounted to him for nearly all the heading shipped. That afterwards he had a statement made by Innes of the whole number of cars and the number of pieces in each car, probably a month after the receipt of the statement of the defendant company, but did not recollect distinctly. That after making of that statement by Innes he had not seen either Wheeler or McGregor, nor any of the members or officers of the corporation; that he had consulted with Mr. Geer as counsel, and had endeavored to find if defendant corporation had any property in Lapeer County. That he knew of their having property in Genesee County and Flint, and his counsel advised him to commence suit, but that he did not commence suit.

Plaintiff rested.

The evidence of the defendant tended to show that when the heading was transported by rail it was delivered at the manufacturing works of the defendant corporation; that after the delivery of four car loads, at the request and for the accommodation of Merritt, who was then engaged, or about to engage, in the transportation of the remaining heading by vessel from Detroit, said defendant corporation waived the right to receive said heading at the manufacturing works at the first instance, and consented to receive the same at its own dock in the city of Cleveland, upon the agreement and understanding made with Merritt that Merritt & Co. were to pay the extra expense of delivery at the works, such as cost of teaming and expense of dockage and sundry expenses of that kind, and that $1.50 was agreed upon to cover it, and that such charge was reasonable; the charge, therefore, in Schedule F, was not disputed.

That upon the receipt of the heading at Cleveland it was inspected by the inspector of the defendant corporation,

one Bowzy, who had been in the employ of said defendant for a number of years as inspector and in the matching of heading; that he received, inspected and matched all heading received by the defendant; that he received all the heading from the vessels which were employed to deliver the heading in controversy in this cause; that the vessels which brought the heading in controversy were exclusively loaded with such heading; that upon the arrival of the vessels the heading was wheeled back into the yard and piled up in great piles or ranks, as they called it, and then it was inspected and matched by the said Bowzy, and afterwards delivered to teamsters to be transported to the manufacturing works of the defendant; that upon such delivery they were counted in presence of the teamsters, and reported to him and entered by him upon a book; that the teamsters were paid according to the matched count; that the matching was done upon the dock of the defendant.

The said Bowzy, being upon the stand as a witness, gave in detail the gross count of heading that came upon each vessel, and then gave in detail the number of matched heading which was the result of his inspection and matching of each cargo; that he kept a record of all the gross pieces as well as of the matched heading; that in entering upon his memoranda the number of matched heading he always entered the name of the vessel it came in, and that his count of the gross pieces included all the heading except the four carloads, that is, included all that came by vessel. That the number of such gross pieces was 2,396,160; that the heading in controversy was kept separate from all other heading, and each cargo was kept separate by itself, and could not possibly be mixed, except that when two vessels arrived at the same time with the heading it was loaded upon the dock and put together in one pile, and the report would show the matched heading of the two cargoes.

The witness then detailed the usual manner and mode of matching all heading received by the defendant company; that his report to the defendant corporation was made in matched

heading and not the gross number of pieces; that the total count of matched heading so received was represented by the several reports heretofore mentioned in the bill of exceptions, and that the aggregate is 1,758,539, including 3,592 pieces received in September, after the rendition of the account Schedule F; that the heading in controversy ran better than any other stock that had been received that year, that is to say, it matched better; that it had been discovered on the former trial that he made some errors in computation, that is, in figuring up.

The said evidence further tended to show that the matching of said heading and the inspection thereof was accurate and correct.

That the matching was done in conformity and in accordance with that clause of the contract which provided that whenever more than two pieces are required to make a heading the same shall count as two. That every piece was used in said matching, and none thrown out as culls after the first four carloads and first cargo.

That a watchman was constantly kept on the dockyard when the heading was received and matched.

That Bowzy matched the heading with the same care that he exercised with reference to other heading, and honestly and to the best of his ability, and had no interest in the defendant company, except as an employe.

The witness Bowzy, in detailing the mode of matching the heading, as to the other cargoes other than the first, every portion of which he matched, stated that he matched only portions of such other cargoes; for instance, that he took one thousand pieces and laid them off and piled them up, and arrived at the matching by average in order to see how many pieces of heading it would take to make the number of inches. That he had instructions not to cull it any more, but just to match it. That this is the usual way of matching heading, and is the regular custom, and is an accurate way of matching it. He matched the whole number of cargoes in this way.

On cross-examination, Bowzy testified that the said heading was received in Cleveland from the vessels at the dock of the defendant, and that at times there were two or three vessels there waiting to be unloaded, and that heading and staves were received at the same dock, shipped from Wisconsin, besides the staves and heading coming from Detroit. That the first cargo was by him actually matched as it was counted and inspected. That he did not match any more the same as that cargo, but by making experiments; he did not know how many experiments he made on the Merritt heading, but made more than one—could not tell how many—that it was according to how the stock run; if the stock run even he did not make many, but he always made more than one; that he made his experiments before the teamsters commenced loading; that they reported to him the total number of pieces, and then made a record of it, and he reduced it to matched heading: that the reduction was made each time before they went away; that he could not say how long some of the heading remained in the yard before it was hauled away; that he could not tell whether it remained as long as three or four weeks; that his best judgment was that it did not; that he may have stated on the former trial that some of it remained there three or four weeks.

It further appeared on his cross-examination, that several mathematical errors occurred in his counts, as rendered to the defendant corporation, and that these were first discovered on the former trial.

Further evidence was given for the defendant by one George Wyman, who testified that he was bookkeeper for The Standard Oil Company; that since the commencement of this suit he had been over the books and made computations and carried out the reductions to see if there was any mistake made at the time the account, Schedule F, was rendered to Helme; that the books of Bowzy, and all the figures, where examined by him with the greatest care possible,

and it was found that Bowzy, in taking his basis of average, made sometimes a mistake in counting his average, and in one case, in transferring from the stub books to book D, left out one wagon load, and that the aggregate of these errors amount to 3,749 matched heading. The testimony of the witness showed that the errors were simply mathematical ones, and were twenty-four in number, and made both in favor of and against the defendant company, and that upon the correction of these mathematical errors, there was a balance due plaintiff of $144.34.

Further evidence tended to show that Merritt, in piling the heading at Lapeer, on the west side of the railroad track, had fraudulently piled a large number of culls and concealed them by good heading. But it was not plain on the part of the defendant that any portion of said culls were shipped from Lapeer, or that Helme had any knowledge of such piling; and it was found on the trial that no part of said culls was shipped, but they were removed, by the direction of Helme, when the heading was inspected and shipped, from the rest and left upon the ground.

Further evidence on the part of the defendant was given of the number of heading that could be worked up by the men employed at the manufacturing works of the defendant corporation within the time the heading in controversy was being used, and the number of barrels manufactured, tended to show a like result as the testimony of Bowzy, as to the gross count of the heading received by the defendant corporation in Cleveland.

The evidence on either side tended to show that the difference between the parties was in the number of total pieces shipped and received, and not in the matter of matched heading. There was no evidence which tended to impeach the correctness of Bowzy's matching so far as the process of matching tself was concerned.

The evidence further tended to show that the said defendant corporation was not aware of any objection or any claim that the statement, Schedule F, or the statement in the final letter of September 25, 1875, was not correct, and was not in anywise advised of the claim of said plaintiff in this suit, until the bill of particulars was served upon its counsel. The evidence further tended to show that such a statement of account as shown by Exhibit F, was correct in every respect and particular. It was also in accordance with the original entries upon the books of the defendant corporation, made up at the time of the transactions, and also that the statement contained in the final letter of September 25, 1875, of one lot of heading carried by the schooner "Wellhouse," was also correct in every respect and particular.

It was also admitted by the plaintiff's counsel that the money charged against Helme, in the statement, Schedule F, had been received by him, and that the defendant was entitled to credit therefor.

It also appeared in evidence that upon said trial that at the time said heading was loaded in Detroit upon the vessels, that bills of lading were made and delivered to the captains of the boats, by the dock men, showing the car loads of heading on each vessel, which bills of lading were, upon the arrival of the vessels in Cleveland, by the captains delivered to the defendant at its office, and there the vessel freight was paid by the defendant to the captain, and the bills retained by the defendant, and the freight charged to the plaintiff.

The following is a copy of the bill of lading of the first cargo.

No. .) DETROIT, June 2d, 1875.

Shipped in good order, by S. W. Thompson, Jr., for account and risk of whom it may concern, on board the schooner "Maid of the Mist," whereof
is master, now lying at the port of Detroit and bound for

Cleveland, the following articles, to be delivered in like good order at the port of destination—the danger of navigation, fire, collisions and breakage of canals only excepted—unto the consignee named in the margin, or to his assigns.

In testimony whereof, the master of said vessel hath affirmed four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Standard Oil Company, Cleveland, Ohio. Ac't J. J. Merritt & Co., Lapeer, Michigan. 18 cars heading, $ per car.

The remaining bills of lading were the same in form, and the dates, vessels, number of cars contained on each appear in the Record on page 43, showing a total of 387 cars, adding four cars which were shipped through by rail, makes a grand total of 391 cars.

There was no evidence in said cause bearing upon the question of loss of heading between Detroit and Cleveland.

The foregoing is an abbreviated statement of the case as contained in the bill of exceptions, omitting, however, objections and exceptions to the ruling of the court; and contains a substantial statement of all the evidence adduced.

Thereupon, the court instructed the jury, that plaintiff's rights in this action are no greater than the rights of Helme would be, were Helme himself plaintiff in the suit.

That, "The right of judging under this contract was vested in the inspector of the Standard Oil Co., and that with his judgment fairly exercised without fraud, both parties would be bound."

The court then gave plaintiff's third request as follows:

"That although the written contract provided that the heading should be subject to count and inspection by the Oil Company, yet, if the difference between the count of the company and the actual number is too great to be accounted for by any variance of judgment between competent and honest counters,

then the company's count is not binding, and the jury should arrive at the correct count by all the evidence in the case."

The court then proceeded to declare that both parties were bound by the judgment of the inspector as to matching; "And when he says they would run five to four, or five and a half to four, his judgment or his decision in that regard is binding."

And then adds:

"But if there was any mistake in the gross count—for instance, in the numerical computation in the number of gross pieces delivered—and those mistakes were made clearly to appear, and the excess was too great to be accounted for by any variance of judgment between competent and honest counters, the company's count of these gross pieces would not be binding, and the jury should arrive at the correct count from the evidence in the case."

The court then referred to the importance of the matter, and adds: "I will repeat what I have said, that the heading was to be delivered at Lapeer, subject, however, to count and inspection of the Standard Oil Company, at Cleveland. Now, then, if that count and inspection was fairly made, and made in the exercise of the best judgment of the inspector, then it is binding here, and the plaintiff is not entitled to recover, beyond the small amount to which I shall allude hereafter. But if the difference between the count actually delivered to the company and this count and inspection in Cleveland was too great to be accounted for by any error of judgment, then the plaintiff is not precluded from showing the mistake.

The court had already said:

"By the word 'counting,' we are to understand two things here,

"1. The counting of the gross pieces, and

"2. The counting of the net pieces, which was arrived at by the matching process, so that by the words 'counting' and 'inspection,' we are to understand three things. The culling

of the good from the bad, the count of the gross pieces, and the count of the net pieces, which was accomplished by the matching of the gross pieces.

"You will observe that the duty of inspecting and counting was vested in this man chosen by the Standard Oil Company, and so far as the culling of the bad from the good was concerned, both parties would be bound by the action of the inspector appointed by the Standard Oil Company."

The court then again declared that the principal dispute in the case is "as to the count" of the heading that was actually delivered under this contract, and after proceeding to observe upon the testimony, adds:

"If, therefore, the plaintiff is entitled to recover at all it must be upon the excess in gross pieces delivered to defendant too great to be accounted for by any variance or error in judgment."

The court then instructs the jury:

"There is no evidence in this case which will authorize you to find that the count, that is the matching, of Bowzy, was fraudulent, or that Bowzy was guilty of any fraud in his counting or matching." And then gives the fourth request of defendant as follows:

"4. The mistakes of Bowzy, which appear by the testimony of Wyman, and which he has scheduled in detail (referring here to some mathematical errors of computation), and not such mistakes as will authorize you to find from them that Bowzy made any mistakes or perpetrated any fraud in the exercise of his judgment in counting or matching the heading. If, upon all the evidence, the jury are unable to determine whether there was fraud or mistake in the count upon either side, or if upon being satisfied that there has been fraud or mistake they are unable to determine which party is responsible for it, the verdict must be for the defendant."

The court upon this subject also instructed the jury: "The terms of the contract are not such as to impose upon the defendant company any obligation to return to Merritt & Co., or their assignee, the gross number of actual pieces delivered.

"It seems that each cargo was received by defendant and inspected by it, and return was made, or a report was made, to the plaintiffs showing the amount of heading in the cargo—that is, of the net pieces. I charge you upon that point that defendant was under no obligation to return the number of gross pieces."

Upon the question of the rendition of the account, the court instructed the jury: "That the rendition and acceptance of the account by Helme in September, 1875, is presumptive evidence that the account is correct. The evidence is uncontradicted that Helme made no complaint to the defendant of the correctness of that account, but kept it in his possession for some five months, and then commenced suit. * * * I charge you in this case that the account was kept such a time as would make it an admission on the part of Helme of its correctness. At the same time Helme is not estopped after all from showing fraud or mistake in the account. There is this difference between an admission and an estoppel, if a man is estopped to claim a certain thing he is entirely precluded, but if it be a mere admission of a certain state of facts he may explain that admission by showing that he was not fully informed, or by showing that since the admission was made he has discovered fraud or mistake in the account. Applying that to this case I instruct you that the rendition of the account to Helme is not an estoppel, but simply an admission on his part of the correctness of the account, and he is not precluded from showing that it is incorrect, but the burden of proof is thrown upon him, and when, as in this case, the account was kept á considerable time and no objection was made to it, the plaintiff ought to make it clearly appear to you that there was error or fraud."

The court further instructed the jury:

"I desire you to take this case to your rooms and deliberate upon it, and I especially desire to say to you that you should not disagree upon the mere question of damages. If you agree that the defendant had made out his defense you will then render a verdict for the plaintiff for $144.44 and interest. If upon the other hand, you think the plaintiff has made out his case, you will estimate as near as you can the amount which you think he is entitled to receive."

Thereupon the counsel for the defendant requested the court to instruct the jury:

"This case is based upon the ground either of fraud or mistake, and there is no evidence of any kind except the two counts, and if the jury find a verdict for the plaintiff, they must find a verdict for the entire amount. Either the defendant is liable for this entire amount, or he is not liable except for the small sum admitted."

Which request the court declined to give.

QUESTIONS INVOLVED.

a. Admission of evidence, permitting witness Helme and other witnesses to give certain testimony by way of estimate, comparison and average as to the gross number of pieces shipped at Lapeer.

b. Refusal to permit the question to witness Coulter on cross-examination, to show his interest in result of suit.

c. Refusal to give several instructions to the jury, all of which appear in the assignments of error, but which principally involve the conclusiveness of the court and the inspection of Bowzy.

The right to a verdict upon the claim of plaintiff or defendant, and not upon a compromise basis.

The contention that it was incumbent upon the plaintiff to show the absence of any loss of heading between Detroit and Cleveland.

ASSIGNMENT OF ERRORS.

1. The court permitted the witness Helme to answer the following questions:

a. State how the heading you saw there compared with that which was shipped on the "Maid of the Mist," in your opinion!

b. Can you explain to the jury fully what matching is?

c. Have you made an estimate by taking the remaining number of cars and comparing them to these, and if they would run the same as the first four cargoes, how many ought there to have been of matched heading?

d. Will you tell the jury what you did with reference to taking advice of counsel to protect yourself!

e. State what else you did for the purpose of seeing whether the defendant had any property in Lapeer county.

2. The court permitted the witness Hugh Coulter to testify as to the total number of carloads loaded under his direction at Lapeer, and the count of the gross pieces of heading shipped at Lapeer.

3. The court refused to permit the witness Coulter to answer the following question:

Have you not recently stated to different parties, in talking about the matter, that you wanted them to recover here, because you would then get your pay?

4. The court permitted the witness Robert Gummerson to answer the following question:

How would the heading, as far as width was concerned, on the east and west sides?

5. The court permitted the witness James Innes to answer the following question:

In your opinion, taking that heading, in the experience you

have had in handling, manufacturing, and everything about it, what would you say would be a fair average of the width of the pieces?

6. The court permitted the witness John Taggert to answer the following question:

In your opinion, how would this heading, referring to the heading in controversy, run as to matching?

7. The court erred in that portion of the instructions to the jury by which it held that, by the contract of April 1, 1874, modifying the contract of October 4, 1873, the heading became the property of the defendant corporation when it was delivered on land in Lapeer.

8. The court erred in instructing the jury that by the word "counting" was to be understood the counting of the gross pieces.

9. The court erred in instructing the jury that the account rendered, marked Schedule F, was only presumptive evidence of its correctness.

10. The court erred in its instructions to the jury upon the subject matter of the account rendered, and the force and effect of the returns received by Helme.

11. The court erred in its instruction to the jury that the rendition of the account and retention, without objection, was the only admission of force in the case.

12. The court erred in refusing to instruct the jury that there is no evidence in this cause which would authorize them to go behind such statement of account rendered, and impeach its correctness.

13. The court erred in refusing to instruct the jury that there is no evidence which would authorize them to find that there was a mistake in the making up, or rendition of the

account, except as to the $144.34, which is admitted by defendant.

14. The court refused to instruct the jury that there was no evidence which would authorize them to find that the statement of account rendered and enclosed in the letter of defendant, of date September 25th, 1875, accompanying the draft of $139.82 was fraudulently made up, or that there was a fraudulent rendition of said statement.

15. The court refused to instruct the jury that there was no evidence in said cause which would authorize them to go behind such statement of account last aforesaid referred to and impeach its correctness.

16. The refusal to instruct the jury that as to such statement of account last aforesaid it was conclusive upon the plaintiff.

17. The court erred in refusing to instruct the jury that the original contract in this cause provides that the heading—meaning the pieces—shall be delivered, on board the cars, at Cleveland, subject to count and inspection by the Standard Oil Company. That whenever more than two pieces are required to make a head—meaning a complete head—the same shall count as two. That the oil company shall receive and pay for the same as passed as inspected at the price of $40.00 per thousand—meaning $40.00 per thousand of complete or matched heading—though this contract is subsequently modified in certain respects by four certain other written contracts, yet the original contract is not qualified, modified or changed in any respect by said written contracts so far as the foregoing provisions are concerned, and such provisions are of operative and binding force upon the parties in precisely the same manner and to the same extent as though the subsequent written contracts had not been made.

18. The court erred in refusing to instruct the jury that, there is no question arising in this cause depending for its solu-

tion upon the terms and provisions of the contracts subsequent to the original contract so called.

19. The court erred in refusing to instruct the jury that the evidence discloses that the shipment of heading beginning in May, 1875, continued to August and a final carload in September. That after count and matching in Cleveland, returns were made by defendant to Helme of the result in matched heading; that such returns were made of each cargo separately, except in one or two instances where more than one cargo arrived at the same time, when the returns was a return of the aggregate cargoes. That Helme either knew or had the means of knowledge so as to determine and detect any mistake or fraud in the count or matching, if such mistake or fraud was of the magnitude as is now claimed, or approximated thereto, that each party acted upon said returns without objection, and continued to receive money based in part, at least, on such returns.

The defendant company continued to receive the heading upon the assumption, that its count and matching were accepted as correct, and continued to pay money in part, at least, upon that basis. Under these circumstances and under the evidence, the plaintiff must now be considered as estopped from objecting to or protesting against the conclusiveness of these returns.

20. The court erred in refusing to instruct the jury that—

There is no evidence in this case which will authorize you to find that whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, the same number of pieces of heading was delivered to the defendant company at Cleveland.

21. The court erred in refusing to instruct the jury that there is no evidence which will authorize you to find that whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, that a like number was subjected to the test of the count of the defendant company at Cleveland, or to the test of the count and matching of the defendant company at Cleveland.

22. The court erred in refusing to instruct the jury that : There is no evidence in this cause which will authorize you to find that Bowzy made any mistake in his process of counting or matching.

23. The court erred in refusing to instruct the jury that : There is no evidence in this cause of fraud or mistake in the counting or matching or inspection by the defendant company at Cleveland, and their account of matching must be considered as conclusive.

24. The court erred in refusing to instruct the jury that the evidence in this cause tends to show that a certain number of pieces of heading was delivered on board the cars at Lapeer or on board vessels at Detroit, and a certain other number arrived at Cleveland. The burden of proof is upon the plaintiff to show that the same number arrived at Cleveland as was delivered on board the cars at Lapeer, in case you should find that a greater number was delivered on the cars at Lapeer than is accounted for by defendant.

BRIEF.

I.

This case was tried by the court below upon an erroneous assumption. To this is largely to be traced the various errors assigned.

The rights of the parties must be determined by the contracts.

Two million of heading was to be delivered, "subject to count and inspection by the Standard Oil Company." Payment was to be made as fast as inspected, "at the price of forty dollars per thousand."

We agree with the court below that by "inspection" is meant such an examination by the defendant company at Cleveland as shall enable it to determine what of the heading comes within the provision "to be sawed twenty-two inches in length, full one inch thick on sap, and full one-half inch thick on the heart edge," * * * "to be well manufactured from good sound white or burr oak, and to be in every respect a first-class merchantable article."

The learned judge says: "I think the word 'inspection' here refers properly to the culling." Record, p. 112.

☞ (*Page refers to marginal page of printed Record.*)

Helme says, in relating his conversation with Wheeler, the agent of the defendant company: "We talked about inspection, and he said if we continued to cull the same, the balance of the heading should run as the first four cargoes did, for matched heading." Record, p. 74.

The reports of the defendant company entitled "Inspection Reports," show, upon the subject of inspection, "heading" and "culls." Record, pp. 73, 74.

This position, therefore, with reference to the meaning of the word "inspection," we presume will not be controverted by opposing counsel.

What, now, is the meaning of the word "*count?*"

The learned judge declared, "by the word 'counting' we are to understand two things here: 1st, the counting of the gross pieces; 2d, the counting of the net pieces, which was arrived at by the matching process, so that by the words 'count and inspection' we are to understand three things, the culling of the good from the bad, the count of the gross pieces, and the count of the net pieces, which was accomplished by the matching process." Record, p. 112.

We insist that as to the meaning of the word "count," the learned judge is in error.

The defendant company contemplated no other count except the count of the matched heading.

No count was to be made by the defendant company until the heading was matched, and this count was based upon the matching, and upon the assumption that "whenever more than two pieces are required to make a head, the same shall count as two;" but whatever number was thus required, it counted as only one heading, in making up the count of two million.

The learned judge so far agrees with us upon this point as to declare:

"I charge you upon this point that defendant was under no obligation to return the number of gross pieces." Record, p. 119.

It was not contemplated by either party that any other report should be made by the defendant company than the report of the heading.

The inspection reports show this, and it is substantially admitted by the case of the plaintiff.

It is clear that the word "heading" has no reference whatever to the gross number of pieces—a unit, it is true, formed

from a consideration of the gross number of pieces, but, after all, the only unit with which the defendant company, under the terms of the contract, is bound to deal.

Starting upon this false assumption of the meaning of the word "count," the court is naturally led into error.

The learned judge concedes that, upon the question of matching, the action of Bowzy is conclusive upon the parties.

This is a concession which, in any event, carries us to the position maintained above, because the "count" is to be determined by the matching, and if the matching is conclusive, the "count" must necessarily be conclusive, if by the "count" is meant the process by which the number of matched heading is obtained.

It is to be observed that this position would not be much weakened if we include in the meaning of the words "count and inspection" the count of gross pieces, because it would still remain that the delivery was to be "subject to count and inspection by the Standard Oil Company."

As the learned judge seems to accord with the position we maintain, upon the question of the conclusiveness of the inspection and upon the question of the conclusiveness of the count, providing the count means what we now contend for, a citation of authorities would seem to be unimportant.

A reference to them, however, may explain and define the limits to which the rule extends.

Savercool vs. Farwell, 17 Mich., 308.

This case involved the construction of a lumber contract, in which it was provided, "sawed lumber to be inspected by W. E. Warriner," a phrase of much less vigor than the one in the present contract. It was held that the inspection was conclusive upon the parties.

See also,

Oakes vs. Moore, 24 Me., 214.
Robinson vs. Fiske, 25 Me., 401.
Merrill vs. Gore, 29 Me., 346.

Leebrick vs. Lyter, 3 Watts & Serg., 365.
McAuley vs. Carter, 22 Ill., 53.
Keeble vs. Black, 4 Tex., 69.
Grafton vs. East. Counties R'y Co., 8 Exch., 699.
Grant vs. U. S., 7 Wall., 331.
U. S. vs. Wormer, 13 Wall., 25.
Smoot's Case, 15 Wall., 36.

The "count and inspection" were regulations of the defendant company, subject to which, and upon the basis of which alone, any liability against it could arise.

To hold otherwise would be to nullify the provisions of the contract in this respect.

The defendant company had stipulated that the "count and inspection" should be determined by it at Cleveland.

In accordance with this provision, it furnished its regular inspector for this purpose.

The court, however, left it to the jury to determine the "count" upon the whole evidence.

As is well said in *Leebrick vs. Lyter*, above cited:—

Where parties to a contract for the delivery of materials specify by whom the measurement of them may be made, such measurement must be resorted to as the evidence to govern the parties; it is error to refer it to a jury to ascertain the quantity of materials delivered upon all the evidence given on the subject.

So, in *McAuley vs. Carter*, above cited, where a contract was made for the performance of work, and the balance was to be paid the contractors on the completion of the contract, "provided the said superintendent shall certify in writing that they are entitled thereto," the court says:—

"This being the contract of the parties, the case on the part of the appellees"—(contractors)—"was made out by producing and proving the final certificate of the superintendent. That was the condition, and the only one, on which their title to recover rested, and when produced, it must be held, in the

absence of any fraud, conclusive. No evidence of the amount of work done, or of its character, was admissible—both parties are concluded by the certificate of the superintendent." Citing authorities.

"The superintendent must be regarded as the sole and exclusive judge of all matters pertaining to this contract, and from his decision there is no appeal, nor can it be attacked except for fraud and mistake, neither of which is alleged. And the mistake, to be available, must be one which shows clearly the superintendent or judge was misled, deluded and so far misapprehended the fact, that he did not exercise his real judgment in the case."

So, in *Keeble vs. Black*, above cited, where the defendant had purchased a crib of corn at so much a bushel, the quantity to be left to the opinion of a third person without measurement, and had received the corn on the estimate of such third person and used it; *held*, that, in the absence of fraud or misrepresentation, the estimate was conclusive.

II.

Conditions under which Bowzy's Count and Inspection Could be Impeached.

Under what conditions could this count and inspection of Bowzy be set aside?

Clearly for no other cause, within the authorities, than that of fraud or mistake.

The question, therefore, of how many pieces were delivered on cars at Lapeer by plaintiff's assignors, is not open to proof, until the count and inspection of Bowzy shall be shown to be infected with the infirmity of fraud or mistake.

It is not claimed that Bowzy's count and inspection is so infected by the disclosures of any direct evidence, or of any evidence affecting at all his method or judgment, or, indeed, isc uhondct.

Thus, we see the court admitting evidence of the count at Lapeer—a count which the defendant company had no control of and was not bound by; a count which the very terms of the contract excluded; a count of gross pieces, in which the defendant company had no interest, because it had provided that its liability was to be "subject to count and inspection by the Standard Oil Company," at Cleveland.

The count and inspection of the defendant company at Cleveland, which the parties have agreed shall be conclusive, is confronted with the count at Lapeer, in which the defendant company was in no manner interested.

The apology for this course is to be found in the instructions of the court to the jury:

"But if there was any mistake in the gross count—for instance, in the numerical computation of the number of gross pieces delivered;—and those mistakes were made clearly to appear, and the excess was too great to be accounted for by any variance of judgment between competent and honest counters, the company's count of these gross pieces would not be binding, and the jury should arrive at the correct count from the evidence in the case." Record, p. 113.

Here "the company's count of gross pieces" is mentioned as not binding. The company made no count of gross pieces, and reported none. So far as Bowzy made such count, he did it incidentally, and for his own amusement.

Here, too, singularly enough, "A variance of judgment between competent and honest counters" is spoken of as though it were a question of judgment between competent and honest counters at Lapeer and Cleveland,—setting over against the judgment of Bowzy the judgment of the counters at Lapeer. The court had, however, already declared that the judgment of Bowzy, whenever it was exercised, was conclusive, and by the terms of the contract it did not concern the defendant company whether the counters at Lapeer were competent or whether they were honest.

The defendant company had carefully excluded any responsibility on its part for the count at Lapeer.

The learned judge continues: "As this is a matter of considerable importance, I will repeat what I have said, that the heading was to be delivered at Lapeer, subject, however, to the count and inspection of the Standard Oil Company, at Cleveland. Now, then, if that count and inspection was fairly made, and made in the exercise of the best judgment of the inspector, then it is binding here, and the plaintiff is not entitled to recover beyond the small amount to which I shall allude hereafter; but if the variance between the count actually delivered to the company and this count and inspection in Cleveland was too great to be accounted for by any error of judgment, then the plaintiff is not precluded from showing a mistake." Record, .p 113.

The court then proceeds to admit evidence of the count of the gross number of pieces at Lapeer, with a view to permit the jury to infer fraud or mistake from the fact that the count of gross pieces, as claimed by plaintiff's assignors at Lapeer, is at variance with the count of gross pieces claimed by the defendant company, as gathered from the count and inspection at Cleveland.

This evidence, as we have before intimated, was wholly inadmissible, until Bowzy's count and inspection was shown to be open to the charge of fraud or mistake.

To say that this fraud or mistake could be proved by the count of gross pieces at Lapeer, by plaintiff's assignors, or could be inferred by any variance between the alleged count at that point and Bowzy's count and inspection, is to nullify the provisions of the contract, with reference to the count and inspection of Bowzy, and to make it of no use whatever as a clause of protection to the defendant company.

The evidence is admitted wrong end forward. It was competent to impeach the count and inspection of Bowzy, for fraud or mistake, by any evidence which had a legitimate tendency in that direction.

The evidence was only admissible in case there was fraud or mistake in Bowzy's count and inspection.

It was not admissible to prove such fraud or mistake, and had no tendency in that direction.

It is conceded by the court that this evidence is not admissible, or, rather, that it would not be effective, unless the "variance between the count actually delivered to the company and the count and inspection at Cleveland was too great to be accounted for by any error of judgment;" and it is assumed that it is a question for the jury when the variance aforesaid becomes too great to be thus accounted for.

Here, the admissibility of the testimony itself is to be determined by the magnitude of the variance, as found by the jury. We are at once precipitated into a sea of uncertainty. One juryman may think that such a variance occurs when there is a difference of a thousand gross pieces, and another juryman may think that there ought to be a hundred thousand; and so finally the jury may compromise upon the subject of variance, and whether poor Bowzy has acted fraudulently, or made a huge mistake, is, therefore, to depend upon the jury's determination of this question of variance, when the variance itself may not have existed at all, in fact, or, if it existed, may be susceptible of explanation upon several other hypotheses than the fraud or mistake of Bowzy.

If this be a correct ruling, how is the defendant company in any better position, or the plaintiff in any worse position, than though the suit was brought for goods sold and delivered.

In such a case, the quantity of goods so sold and delivered would be determined by all the evidence in the cause, and the evidence on either side, as admitted by the court, would be competent for this purpose.

But we insist that the company has seen fit to insert, and plaintiff's assignors have seen fit to accept, a provision in the contract which precludes a recovery upon any such basis, but confines the recovery to such heading as shall have passed the count and inspection of the defendant company at Cleveland.

The court, upon the basis of this ruling, finds itself involved in an inconsistency; for, the learned judge says to the jury:

"There is no evidence in this case which will authorize you to find that the count—that is, the matching of Bowzy—was fraudulent, or that Bowzy was guilty of any fraud in his count or matching." Record, p. 116.

Before that, however, the learned judge had said, referring to the count and inspection at Cleveland:

"If that count and inspection was fairly made, and made in the exercise of the best judgment of the inspector, then it is binding here." * * * "But if the variance between the count actually delivered to the company, and this count and inspection in Cleveland was too great to be accounted for by any error of judgment, then the plaintiff is not precluded from showing a mistake." Record, p. 113.

So the learned judge, having first declared that the magnitude of the variance is to determine whether the judgment of Bowzy is conclusive or not, subsequently declares that there is no evidence in the case which will authorize the jury to find that Bowzy was guilty of any fraud in his counting or matching.

But if it be said that the counting here referred to means the counting of the net pieces, in connection with the matching, we suggest that there is no pretence that Bowzy did not match and count all the heading that was delivered; and if any fraud is to be found in the process of counting at Cleveland, it must necessarily be in the counting of the net pieces, because the defendant company was under no obligation to count the gross pieces; and if Bowzy did count them, approximately or otherwise, it would still remain that, if there was any fraud in such counting of the gross pieces, the fraud must necessarily continue and be involved in the counting of the net pieces, or the heading proper.

If there is no evidence of fraud on the part of Bowzy, there is certainly no evidence of mistake. The evidence does not disclose a case where a mistake could exist without fraud, so far as Bowzy is concerned.

In the Pennsylvania case of *Leebrick v. Lyter*, above cited, it is said:

" The mistake, to be available, must be one which shows clearly the superintendent, or judge, was misled, deluded, and so far misapprehended the fact, that he did not exercise his real judgment in the case."

Nothing in this case has been shown which would warrant an inference of that kind as to Bowzy. The evidence shows that he inspected all that he received; that this heading was kept separate; that he inspected it in the same manner as he was accustomed to inspect the remainder of the heading of the defendant company; that such inspection was proper, and conducted by proper methods, and was correct; and further evidence on the part of the defendant company shows that it was undoubtedly correct, particularly that portion of the evidence in which it appears that the number of heading that could be worked up by the men employed at the manufacturing works of the defendant company and the number of barrels manufactured within the time the heading in controversy was being used, accorded with the count of the gross pieces, as well as the matching and the counting of the net pieces, as made by Bowzy.

III.

Heading Shipped Not Necessarily Delivered at Cleveland,

The contract of October 4th, 1873, was modified by the contract of April 1st, 1874.

This modification was at the request of J. J. Merritt & Co., and was made solely to enable them to secure advances at greater advantage to them than was provided for in the original contract. Some means had to be resorted to to enable the parties to determine upon these advances, and it was agreed that for this purpose the heading should be piled upon certain land under the control of the defendant company; that Merritt & Co. should furnish a man to count the heading so piled, and upon the certificate of this counter, presented to the defendant

company, the advances would be made ; and the clause of the modified contract particularly bearing upon this subject is as follows :

" Whereupon, the delivery of such heading so counted shall be deemed complete, and said heading shall then become and thenceforth be the property of second party, absolutely and unconditionally ; and upon the presentation of such certificate of count at the office of said party in Cleveland, Ohio, said second party agrees to pay upon the heading so, as aforesaid, delivered and counted the sum of twenty dollars per thousand heading, by draft on New York." Record, p. 49.

The original contract had provided that the defendant company should "receive and pay for the same as fast as inspected," referring to inspection at Cleveland, "at the price of forty dollars per thousand."

The modified contract, therefore, was made for the accommodation of Merritt & Co., and the provision with reference to this delivery at Lapeer was for the sole purpose of determining in the first instance the sum to be advanced. It did not in any way operate upon the right of the defendant company to its inspection at Cleveland, or its right to make final payment, or the balance of the payment, based upon such inspection ; and to this end the modified contract of April 1st contains the paragraph :

"All the provisions of the contract first referred to," here referring to the contract of October 4th, 1873, "in regard to specifications, delivery, price, inspection, culling, and all other things not expressly changed by this contract, are to remain in force ; this being a modification of said contract in regard to the particulars herein expressly stated, and made for the benefit and at the request of first parties, and for no other purpose." Record, p. 51.

This provision makes the intention of the parties clear, and must govern.

Hatch v. Oil Co., 100 U. S., 124.

The court seems to have taken this view of the subject, for the learned judge, after reciting the provisions of the con-

tract of October 4th, 1873, as providing for delivery "subject to the count and inspection of the Standard Oil Company," adds:

"On the 1st of April, 1874, there was a supplemental contract made to the original contract, reciting the terms of the original contract and the organization of the firm of Merrit and Helme. The main provision of this modification is, that instead of the heading becoming the property of the defendant when delivered in Cleveland, it should become the property of the defendant when it was delivered on land in Lapeer county leased by defendant, but still subject to the inspection and count of the defendant in Cleveland." Record, p. 109.

At this point he drops the subject.

He is asked, however, by the counsel for the defendant company, to instruct the jury as follows;

"9. * * * Though this contract," referring to the contract of October 4, 1873, "is subsequently modified in certain respects by four certain other written contracts, yet the original contract is not qualified, modified or changed in any respect by said written contracts, so far as the foregoing provisions are concerned," referring to the provisions relating to the delivery and count and inspection at Cleveland, "and such provisions are of operative and binding force upon the parties, in precisely the same manner and to the same extent as though the subsequent written contracts had not been made.

"10. There is no question arising in this case depending for its solution upon the terms and provisions of the contracts subsequent to the original contract, so called."

* * * * * * * * * * * *

"12. There is no evidence in this case which would authorize you to find that, whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, the same number of pieces of heading was delivered to the defendant company at Cleveland.

"13. There is no evidence which would authorize you to find that, whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, a like number of heading was subjected to the test of the count of the defendant company at Cleveland, or to the test of the count and matching of the defendant company at Cleveland." Record, pp. 105, 106.

The bill of exceptions declares, "there was no evidence in said cause bearing upon the question of loss of heading between Detroit and Cleveland." Record, p. 103.

Here, therefore, another fact is developed, which demonstrates the gross injustice done to the defendant company by the manner in which this cause was submitted to the jury.

We take it, the learned judge must have assumed that even though all of the heading had been cast overboard or otherwise lost between Detroit and Cleveland, nevertheless the defendant, in some way, was responsible for the variance between the count and inspection of Bowzy and the account of gross pieces at Lapeer, upon some sort of a presumption that when the heading was shipped it necessarily reached its port of destination.

As opposed to any inference of this kind, however, we have the further declaration in the bill of exceptions:

"It also appeared in evidence upon said trial, that at the time said heading was loaded in Detroit upon the vessels, bills of lading were made and delivered to the captains of the boats by the dock-men, showing the carloads of heading on each vessel, which bills of lading were, on the arrival of the vessels in Cleveland, by the captains delivered to the defendant, at its office, and there the vessel freight was paid by the defendant to the captain, and the bills retained by the defendant, and the freight charged to the plaintiff;" and then follows a form of bill of lading. Record, pp. 100, 101.

Can it be supposed that freight bills were settled to the satisfaction of the masters of the vessels upon a basis which

supports the count and inspection of Bowzy, and at the same time be successfully contended, upon some conjecture or estimate at Lapeer, that upon 263,303 matched heading, probably over 500,000 gross pieces, no freight at all was paid ?

Our contention, therefore, is, that before any inference of fraud or mistake could be fairly drawn as impeaching the correctness of the count and inspection by Bowzy at Cleveland, if it could be impeached at all in that way, it was incumbent upon the plaintiff to show, not only the shipment of what he claimed to be the number of gross pieces, but also the arrival of such number at the port of Cleveland, and the delivery of the same to the defendant company, and there is no presumption in law that the same number arrived that was shipped.

Had this been a case between the defendant company, as consignees, and the vessel, Bowzy's count and inspection would have made out a *prima facie* case, and it would have been incumbent upon the carrier to show that the same number of heading was delivered as shipped, and the burden would be upon him to prove that there was no loss between shipment and delivery, or if there was any loss, that it was not occasioned by his default.

Clark v. Barnwell, 12 How., 273.
Nelson v. Woodruff, 1 Black., 156.
Alden v. Pearson, 3 Gray, 342.
Tarbox v. East. Steamboat Co., 50 Me., 339.

A like burden devolves upon the plaintiff.

IV.

Character of the Evidence Adduced.

The error of the court, in his instructions upon the subject of "variance of judgment between competent and honest counters," is further illustrated and emphasized by the character of the evidence permitted to show the count of gross pieces at Lapeer.

Much of that evidence was matter of comparison, conjecture and estimate, evidence that, perhaps, would have been competent, had the question been as to the count of goods sold and delivered, but a kind of evidence which is glaringly erroneous when the terms of the contract especially provide for a count and inspection at Cleveland by the defendant company, and *not* for a comparison, conjecture or estimate at Lapeer, by persons who were not in the contemplation of either party when the contract was made, and who, by a fair construction of the contract, were excluded.

The witness Helme was permitted to state how certain heading which he saw in the process of loading at Lapeer compared with certain other heading which had been previously shipped on the "Maid of the Mist." Record, p. 74.

And his answer was: "So far as my opinion is concerned, the heading averaged the same all the way through."

The witness having stated that, before the agreement made with Wheeler, four cargoes had been shipped, and that, according to Innes' report to him, there were in the first four cargoes shipped after the four car loads, 378,066 pieces and fifty-eight cars, was permitted to answer the following question :

"Q. Have you made an estimate by taking the remaining number of cars and comparing them to these, and if they would run the same as the first four cars, how many ought there to have been of matched heading?

"A. There were 878,066 pieces on the first four cargoes. They returned 283,986 of matched heading. Taking the whole number of pieces at the same proportion it would give us a total of 2,021,842 of matched heading; and they returned us exactly 1,758,539, making a difference of 263,303 matched heading, which, at $40 a thousand, would be $10,532.12." Record, pp. 75–6.

This is about as bad a case of conjecture as one can well imagine, in view of the fact that the defendant company have carefully excluded, by the terms of the contract, all guesswork at Lapeer which should be binding upon it.

So, the witness Gummerson, a mere boy, was permitted to answer the question :

"Q. How would the heading average as far as width was concerned, on the east and west sides?

"A. They were about as good, I guess." Record, p. 89.

The witness James Innes was permitted to answer the question :

"Q. In your opinion, taking that heading, and with the experience you have had in handling, manufacturing, and everything about it, what would you say would be a fair average of the width of the pieces?

"A. About nine inches—that would take about five pieces to make four—that is, about one-half two-piece and one-half three-piece heading." Record, p. 90.

The witness Taggert was permitted to answer :

"Q. In your opinion, how would this heading," referring to the heading in controversy, "run, as to matching?

"A. I should think about half two-piece and half three-piece heading." Record, p 90.

All this evidence, we maintain, was erroneous, and open to the same criticism as suggested above, in regard to the testimony of Helme. It was all a series of conjectures, guesses, estimates, set over against the count and inspection of Bowzy.

The court also erred in refusing to allow to be put to the witness Coulter, on cross examination, the question:

"Q. Have you not recently stated to different parties, in talking about the matter, that you wanted them to recover here, because you would then get your pay?" Record, p. 88.

This was clearly admissible, as bearing upon the credibility and interest of Coulter.

All witnesses are supposed to be moved, more or less by interest.

It was supposed by the counsel of the defendant company, that Coulter was influenced by the consideration that the suc-

cess of the plaintiff in the suit would secure to him his pay. If he had made a remark of that kind out of court, it would materially bear upon his credibility, unless he could explain it. It is very easy to see how, if his pay was contingent upon plaintiff's recovery, it might influence his testimony in favor of the plaintiff, and very importantly color it.

V.

Verdict of the Jury and Judgment, $7,688.

Germane to the foregoing discussion, and closely connected with it, may be considered the verdict of the jury—an extraordinary spectacle, in the light of the evidence, and evincing proof irrefragable that they were unwilling, even from the testimony submitted, to find any fraud or mistake in the count and inspection at Cleveland; yet, moved by considerations of the supposed wealth of one party and the moderate pecuniary condition of the plaintiff, or his assignors, determined, upon a false notion of equity, to split the claim. They evidently substantially divided the claim, added the interest, and perhaps allowed something to the plaintiff for expenses and counsel fees.

The defendant company was entitled, however, we maintain, to an absolute prohibition of such conduct.

There were but two possible views upon the evidence as submitted, upon which a verdict could be rendered; one was the testimony of plaintiff's witnesses, showing that the quantity actually delivered was 2,021,842 of matched heading, and the return of the defendant company of 1,758,539, making a difference of 263,303 of matched heading, which, at forty dollars per thousand, would amount to $10,532.12. See testimony of Helme, plaintiff's assignor, Record, p. 76.

The other view was that of the defendant company and its witnesses, whose testimony showed that the returns of the company were correct, and therefore that the 1,758,539 of matched heading was the quantity for which the defendant company was liable.

The verdict, therefore, should have been, under proper instructions of the court, either for $144.34, or for $10,532.12. There was no middle ground upon which either party could proceed, and neither party assumed to proceed upon any middle ground.

There was no evidence justifying any compromise verdict, and the evidence accorded no latitude to the jury in this respect. There was nothing left to them authorizing any conjecture or compromise estimate.

Anticipating such a possible contingency, the court was asked, at the close of the charge, to instruct the jury as follows: "This cause is based upon the ground of either fraud or mistake, and there is no evidence of any kind, except the two counts," referring here to the number of heading delivered, "and if the jury find a verdict for the plaintiff, they must find a verdict for the entire amount. Either the defendant is liable for this entire amount, or he is not liable, except for the small sum admitted." Record, p. 120.

This instruction the learned judge declined to give, and he refused to instruct the jury at all upon this point.

The result was, that a verdict was found which is repugnant to the proofs upon either side.

The defendant company had a right to hold the jury within the lines of the proofs.

Moynahan v. Connor, 30 Mich., 136,

VI.

ACCOUNT STATED.

On August 16, 1875, plaintiff's assignor, Helme, wrote the defendant company as follows:

"Heading is all shipped but one car left at Detroit, which will have to go with the Merritt staves" (it appeared that the parties were dealing in staves as well as heading); "I wish you to inspect and send the reports of the amount received.

It is very necessary to me that it be done this month, as I have further payments to make September first, and if there is anything coming from the Standard Oil Company, I shall need it badly." Record, p. 81.

To which the defendant company replied as follows :

"CLEVELAND, O., August 20, 1875.

"H. HELME, ESQ., Bay City, Mich.

"DEAR SIR:—Enclosed please find statement of J. J. Merritt account to date, showing balance due of $542.54, for which we enclose our draft No. 3520, on New York, to their order for like amount. Please acknowledge receipt of draft and reply.

"STANDARD OIL COMPANY,
"A. M. MCGREGOR."

Record, p. 82.

Enclosed in the aforesaid letter was a full statement of account, from the beginning of the dealings between the parties in the matter of heading, April 1, 1874, up to and including the entire delivery (with the exception of the "one car left at Detroit"), showing a balance of $542.54, which was remitted by draft. Record, pp. 123–127, inclusive.

Subsequently Helme wrote as follows

"BAY CITY, Sept. 21, 1875.

"A M. MCGREGOR, ESQ., Cleveland.

"DEAR SIR :—I shipped you on September 3d, from Detroit, one car of heading. This time it was culled. Please remit the proceeds and oblige, "Yours truly,

"H. HELME."

To which the defendant company replied as follows :

"CLEVELAND, O., Sept., 25th., 1875.

"H. HELME, ESQ., Bay City, Mich.

"DEAR SIR :—Enclosed, please find our draft, No. 3820, on New York, to the order of J. J. Merritt & Co., for $130.82, as per statement below :

"Net proceeds heading carried by schooner 'Wheelhouse,' report enclosed	$131 29
"692 Cull heading, $13.56 per M	8 53
	$139 82

"Please acknowledge receipt of draft and oblige,

"Yours truly,

"A. M. MCGREGOR."

To which Helme replied as follows:

"BAY CITY, Sept. 28th, 1875.

"A. M. MCGREGOR, ESQ., Cleveland.

"DEAR SIR:—Your favor of the 25th, inst., enclosing New York draft, $139.82, is received.

"Yours truly,

"H. HELME."

Record, pp 81 to 83, inclusive.

Helme further testified that upon receipt of the statement marked "Schedule F," he made no objections thereto, and had not at any time made any objections thereto to the defendant, either verbally or by letter, nor to the statement contained in the final letter of September 25, 1875; that he was last in Cleveland, at the company's place of business, in August, 1875; that he saw Mr. McGregor; that he said nothing to him about the inaccuracy or incorrectness of the returns; that he said nothing about the account not being correct; that he had facilities in his power to figure it, but he never did it; that McGregor gave him a statement of the number of carloads on each boat—each bill of lading also stated so many carloads of heading—and gave him the name of the boat; that witness received the bills of lading of S. W. Thompson, Jr., of Detroit; that he knew the number of cars that were on each vessel by the bills of lading, and that he knew the whole number of cars shipped in Detroit.

It was conceded that between Cleveland and Lapeer, there was a daily mail leaving Cleveland on the one day and arriving at Lapeer on the next. Record, pp. 83, 84.

Upon this statement of facts, counsel for the defendant company requested the court to instruct the jury.

3. The defendant, in a letter of August 20th, 1875, rendered to Helme a statement of account, which statement shows the quantity of matched heading which defendant had received, and credits the money which defendant had paid. It also

showed a statement of interest, freight, dockage, cartage and insurance which defendant had paid, and which defendant claims are a proper charge against Helme.

Helme ackoweledges to have received this statement within a day or two, accompanied by draft of $543.54; the amount shown to be the balance due by such statement, and also the letter in which it was enclosed; and he testifies and admits that he accepted said draft and never made any objection to said statement; and such statement of account rendered becomes conclusive between the parties, unless objection is made to it by Helme within a reasonable time, unless there has been fraud or mistake on the part of defendant.

The court having declined and ruled that the commencement of suit could be treated as an objection to the statement set forth in Schedule F, to such ruling and decision of the court, counsel for defendant did then and there except, and thereupon further requested the court to instruct the jury.

4. If you take the commencement of suit, January 10th, 1876, as an objection to said account, then, in view of the admission of counsel for plaintiff, that there is a daily mail between Cleveland and Lapeer, the objection was not made within a reasonable time; the account cannot be disturbed, except for fraud or mistake.

5. There is no evidence in this case which would authorize you to find that the account was fraudulently made up, or that there was a fraudulent rendition of the account by the defendant.

6. There is no evidence in this case which would authorize you to go behind such account rendered and impeach its correctness.

11. The evidence discloses that the shipment of heading, beginning in May, 1875, continuing to August, and the final carload in September; that after count and matching in Cleveland returns were made by defendant to Helme of the result in matched heading; that such returns were made of each cargo separately, except in one or two instances, where more than

one cargo arrived at the same time, when the return was a return of the aggregate cargoes; that Helme either knew or had the means of knowledge, so as to determine and detect any mistake or fraud in the count or matching, if such mistake or fraud was of the magnitude as is now claimed, or approximated thereto; that each party acted upon said returns. Helme continued to ship, notwithstanding said returns, without objection, and continued to receive money based in part, at least, on such returns. The defendant company continued to receive the heading upon the assumption that its count and matching were accepted as correct, and continued to take money in part, at least, upon that basis. Under the circumstances, and under the evidence, the plaintiff must now be considered as estopped from objecting to or proceeding against the conclusiveness of these returns. Record, pp. 103, 106 inclusive.

The court instructed the jury as requested in numbers 3, 4 and 5. Record, p. 114.

But declined to give numbers 6 and 11; and instead thereof instructed the jury as follows:

"That the rendition and acceptance of the account by Helme in September, 1875, is presumptive evidence that the account is correct. The evidence is uncontradicted that Helme made no complaint to the defendant of the correctness of that account, but kept it in his possession for some five months, and then commenced suit." * * * "The plaintiff ought to make it clearly appear to you that there was error or fraud." Record, p. 118.

The learned judge, it seems to us, occupies inconsistent positions.

There is certainly no evidence which would authorize the jury to find any mistake, except as to the small amount of $144.34, which is really embraced in the "E. & O. E." (errors and omissions excepted) in Schedule F.

The court, still leaving it to the jury to find that the account is infected with fraud, yet instructs the jury that there is no evidence which would authorize them to find that there was a fraudulent rendition of the account.

But we submit that the court was in error in not ruling, as a matter of law, that the time between the rendition of the account and the commencement of suit—if the commencement of suit can be regarded as an objection to the account, which we do not concede—was in excess of a reasonable time.

This question also was left an open one for the jury.

We understand the correct doctrine to be:

a. That an account rendered becomes an account stated, unless objected to within a reasonable time.

b. What constitutes a reasonable time in such a case is a question of law.

c. An account stated cannot be impeached, except for fraud or mistake.

It is sometimes said that a stated account is only *prima facie* evidence of its correctness; but by this nothing more is meant than that it may be impeached by proof of fraud or mistake. If no such proof is presented, the account is conclusive, if it once becomes an account stated.

Perkins v. Hart, 11 Wheat., 237.

In *Toland v. Sprague*, 12 Pet., 334, it is said: "We agree with the court that the mere rendering an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance or offers to pay it, as it may be in his favor or against him; then it becomes a stated account; nor do we think it at all important that the account was not made out as between the plaintiff and the defendant; plaintiff having received it, having made no complaint as to the items or the balance, but, on the contrary, having claimed that balance, thereby adopted it; and by his own act, treated it as a stated account."

The language used could hardly have been more appropriate if applied to the case at bar.

Helme urged the defendant company to an immediate settlement, for the reason that he was anxious to receive his money; he claimed the balance, he received the balance, and he thereby

adopted the account as rendered. If we add thereto that he never made any objections to it, we have a complete case of an account stated, conclusive between the parties.

But we regard the question as closed in favor of the defendant company by the case of *Wiggins v. Burkham*, 10 Wall., 129. Mr. Justice Swayne, who delivered the opinion, says: "When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake; and in these respects he is in nowise concluded by the admission implied by his silence after it was rendered."

In that case it appeared that the plaintiff *on or about the 16th of May*, 1866, sent to the defendants, by mail, a written statement of the account sued upon, and that the defendants made no objections to it until *about the 28th of that month.* Plaintiff lived in Chicago, and the defendants at Hagerstown, Indiana, distant from Chicago about two hundred and twenty miles by railroad. There was no evidence, however, of the frequency of the mail between those points, and the court held that it could not take judicial notice of it.

The learned judge further suggests that, "if there were several posts between the time of the receipt of the account by the defendants and the date of the letter objecting to it, the court should have instructed the jury that the letter was not written within a reasonable time," and adds, "this would have been conclusive against the defendants."

In that case, the plaintiffs were seeking to claim the account as a stated one, and the defendants were resisting the claim, on the ground that they had objected to it within a reasonable time.

The doctrine that an account stated is conclusive upon the parties, unless impeached for fraud or mistake, and that whether on a given state of facts a transaction constitutes a stated account, is a question of law, is very clearly and strongly laid down by the Court of Appeals in New York, in *Lockwood*

v. Thorne, 11 N. Y., 170. The court says: "The transaction then being an account stated, is conclusive upon the parties, unless the plaintiff affirmatively shows fraud or mistake. The law is stated in *Philips v. Belden*, 2 Edw. Ch. R., 1, that if either party attempts to impeach the settlement, and to open the accounts for re-examination, either wholly or in part, and which can only be done upon the ground of fraud, mistake or error, the burden of proof rests upon the party impeaching, and he must prove the fraud or point out the error or mistake on which he relies. Here no fraud or mistake was pretended. It was merely an attempt to litigate an item once settled, without a shadow of pretence that there had been anything unfair in the settlement, or any misapprehension in regard to it.

It was well said by Chief Justice Marshall, in *Chappelanie v. Dechenaux*, 4 Cranch 306, where an attempt was made to open an account stated, "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestions supported by doubtful or by only probable testimony." Pages 175, 176.

See also Lockwood v. Thorne, 18 N.Y., 285.
Champion v. Joslyn, 44 N.Y., 653.

The same conclusion is arrived at in *Rand v. Wright*, 129 Mass., 50, where the defendant, in answer to the claim of the plaintiff upon a contract for work done, answered that the amount had been agreed upon in an account stated. The plaintiff demurred to the answer, upon the ground that "such accounting does not bar the plaintiff's right to recover the full amount of the items of his account, as set forth in the declaration." The demurrer was overruled, and it was held that the answer set forth all the material facts necessary to constitute the defence.

See also to like effect:

American National Bank v. Bushey, 7 N. W. R., 341.
Linn v. Gilman, 10 N. W. R., 1.
Unreported cases, Supreme Court, Mich.; opinions filed in 1881.

VII.

1. We respectfully submit, therefore, that the count and inspection of Bowzy was binding on both parties, and that it was well advanced as a conclusive obstacle to the plaintiff's recovery.

This construction is the only one that can give any force or effect important to the defendant company, in the construction of that clause of the contract. Had it not been for this clause of the contract, and had the defendant company supposed that the count of gross pieces at Lapeer was to afford any basis upon which to found a liability against it, the Oil Company would have taken some measures to have verified the correctness of said account, or guarded itself against any dangers arising from fraud or mistake therein.

2. The account as rendered was also a conclusive obstacle to the plaintiff's right of recovery.

If plaintiff had made any objections to said account within a reasonable time, the facts could have been determined while the heading was still in the possession of the defendant company, and before it was used or consumed.

In *Keeble vs. Black, 4 Tex., 69*, above cited, where a crib of corn was purchased upon the estimate of a third person, and such estimate was held conclusive, in the absence of fraud or misrepresentation, considerable emphasis was laid upon the fact that said estimate was sought to be impeached after the corn had been used.

So, in this case, the heading having been delivered, the freight bills paid according to the count as now contended for by the defendant company, the freight bills reported to plaintiff's assignors; a statement of the number of carloads on each boat given, and all other facilities to enable the plaintiff's assignors to determine the correctness of the account; the money paid by the defendant company upon the basis of such

a statement, and received and acknowledged by the plaintiff's assignors, upon the same basis; and no objection made, and no claim of any kind preferred, though Helme was at the office of the company and during all the time there was a daily post, and no intimation to the defendant company of the nature of the claim, until several months afterwards a bill of particulars is served, under the common counts of a declaration—we are prepared to accede to and adopt the language of Chief Justice Marshall, quoted by the Court of Appeals of New York, that "no practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestions supported by doubtful, or by only probable testimony."

The testimony in this case in support of the plaintiff's claim, we submit, is not exempted from the criticism of doubtful, and does not rise to the dignity of probability.

DON M. DICKINSON,
Attorney for Plaintiff in Error.

LEVI T. GRIFFIN,
Of Counsel.

OFFICE SUPREME COURT
FILED
1882

No. 322

U. S. Supreme Court.

STANDARD OIL COMPANY,

vs.

GEO. H. VAN ETTEN.

Error to the Circuit U. S. Eastern District, Mich.

ARGUMENT AND BRIEF.

M. E. CROFOOT,

Counsel for Defendant in Error.

PONTIAC, MICH.:
KIMBALL & TURNER, PUBLISHERS.
1882.

No. 322.

SUPREME COURT

OF THE

UNITED STATES.

THE STANDARD OIL COMPANY OF CLEVELAND, OHIO,
Plaintiff in Error,
vs.
GEORGE H. VAN ETTEN,
Defendant in Error.

In error to the Circuit Court of the United States for the Eastern District of Michigan.

ARGUMENT AND BRIEF

OF

M. E. CROFOOT,
Counsel for Defendant in Error.

I.

A.

STATEMENT OF FACTS.

It will be necessary in order to arrive at a proper understanding of the case, to give the prominent facts bearing upon the questions in the record, to be determined by this Court. The STANDARD OIL COMPANY, with its principal business offices at Cleveland, on the

4th day of October, 1873,

entered into a contract with John J. Merritt, of Lapeer County, Michigan, by which Merritt was to manu-

facture and sell to the Standard Oil Company, 2,000,000 heading so called, at the rate of forty dollars per 1,000; the heading was to be manufactured of oak, of certain quality, by sawing from the timber, cutting lengths 22 inches, and so matched (laid side by side), as to make a breadth of 22 inches, from which a barrel head could be manufactured; and each head was to be counted in the contract as two pieces, and to be so counted for settlement and payment. The place of manufacture was Lapeer, some sixty miles from Detroit, by rail, and the place of delivery was on the Company's grounds at Cleveland, and on cars.

The important words of the contract, quoted therefrom, are as follows: "To be delivered on board the cars at Cleveland, on or before the first of March, 1875, subject to *count and inspection* BY THE STANDARD OIL COMPANY, who agree to receive and pay for the same as fast as inspected, at the price of forty dollars per 1,000."

Record p. 18.

B.

On the *fourth day of January, 1874*, Merritt assigned one-half interest in this contract to Henry Helme.

C.

On the *first day of April, 1874*, Merritt & Helme made a supplemental agreement with the Standard Oil Company for an *advancement*, to be made by the Standard Oil Company to them; and for delivery of the heading along side the railroad track near the place of manufacture, upon lands leased, or to be leased, by the Oil Company, where the heading was to be counted and inspected (provisionally), to determine the amount for advances. And when so counted and inspected,

and advances made thereon by the Oil Company, the title was to pass to the Oil Company; the essential provision of which contract, relating to the delivery and title, is as follows:

"Said first party (Merritt & Company) agrees to make and deliver to said second party (Oil Company), the heading (not yet delivered), according to the terms of said contract, properly piled in some suitable and convenient place, to be agreed upon by said parties, on land in Lapeer, in said Lapeer County, controlled by said second party; the delivery to be made as fast as sawed by said first party. Said second parties (Oil Company) are to furnish a man to count as nearly as may be, said heading, from week to week, as the heading is piled. * * * Whereupon the delivery of said heading, so counted, shall be deemed complete, and said heading shall then become and thenceforth be the property of the second party, absolutely and unconditionally, and upon presentation of such certificate of the count at the office of said party, in Cleveland, O., said second party agrees to pay upon said heading as aforesaid, delivered and counted, the sum of twenty dollars per 1,000 heading, by draft on New York." * * * An addenda was added to said contract, making the advance twenty-five dollars per 1,000 on the first 1,000,000.

Record, pp. 19 and 20.

D.

On the *twenty-ninth day of May, 1874*, another supplemental agreement was made between Merritt & Company, and the Oil Company in regard to an over draft by Merritt & Company, or over payment by the Oil Company, of $2,500, and a mortgage was made to secure said over draft; but this contract is not material to the solution of the questions involved.

Record, p. 21.

E.

On the

28th day of August, 1874,

another supplemental contract was made between Merritt & Company and the Oil Company, by which the Oil Company agreed to advance on heading, so counted and piled in Lapeer County, twenty-five dollars on a 1,000 for the second 1,000,000 heading.

Record, pp. 22 and 33.

F.

Afterwards, and before this suit was commenced, these contracts and all the interests of Helme & Merritt were assigned to George H. Van Etten, the plaintiff in the suit below, and the defendant in error here.

NOTE.—We have a statute in Michigan, authorizing the assignee of a *chose in action* to bring suit thereon in his own name.

2 Comp. L. Sec. 5775.
Page 1675.

G.

From all these contracts and the evidence appearing in the record, the contract was for a very large amount, for men operating in the forests of Michigan to handle; and the manufacturers had to rely upon advances, and the amount to be received from the Oil Company, in payment for the heading, to carry on their operations. It was contemplated in the first place, by the parties to the contract, that the heading should be transported from the place of manufacture, to Cleveland, by cars; but subsequent events showing that it was much more economic and practicable to transport by the cars to Detroit, there to re-ship by vessel for Cleveland, this course was followed by the parties, except as to four car

loads which were first forwarded and were inspected and certified separately.

H.

The suit was commenced by attachment in Genesee County, removed by the Oil Company to the Federal Court; and there, after perfecting the pleadings, an issue upon the facts having been made, the cause was tried first on the *twenty-first day of March, 1877,* before the Court and Jury, and the Jury disagreed. The cause was again tried before the Court and Jury, and a verdict rendered in favor of the plaintiff for seven thousand six hundred and eighty-eight dollars, and judgment entered thereon on the *twenty-first day of September, 1877.*

Record pp. 25, 27.

Each one of these trials were hotly contested, and a large amount of testimony taken upon both sides.

I.

After judgment and verdict, the defendant, Oil Company, settled a bill of exceptions, and removed the cause to this Court by writ of error.

The only questions arising in this Court, as appear by the assignment of errors [Record, pp. 55, 56, 57 and 58], arise from the rulings of the Court on the trial, and upon the charge given by the Court, and refusals to charge as requested.

II.

ARGUMENT.

Count and Inspection,——Matching, Gross Pieces, Net Pieces.

In order properly to understand the questions raised by the different assignments of error, it will be necessary to determine at the outset, the correct meaning of the words "count," "inspection," "matching," and the distinction between *gross pieces* and *net pieces* as understood by the parties, and as understood upon the trial of the cause.

1.—MATCHING.

Matching is the process by which persons skilled in the business lays the heading, of 22 inches in length, side by side, to make 22 inches in breadth of good heading timber, which, when matched, is equal to one barrel head; "the two pieces of heading," as named in the contract, to be paid for at forty dollars per 1,000. This process, it will be seen, involves the exercise of judgment in determining how many pieces laid side by side, would make 22 inches in breadth of good heading, as some allowance may be made for imperfect edges.

2.—INSPECTION.

Inspection is the exercise of the judgment of a man, like skilled, in determining what pieces are suitable, and what pieces are not suitable, to make merchantable heading; all not suitable, in his judgment, are rejected as culls.

3.—COUNT.

Count, as named in the contract, means merely the determination of the number of heading, regarded as two pieces, to make a head. *Count*, as applied to pieces of timber, means the number of pieces which we, upon the trial, called gross pieces: so that the word count, in the contract, was used merely to designate the number of pieces of heading [net] to be paid for at the rate per 1,000. That this was the construction put upon it by the Oil Company, abundantly appears by the defendant's 9th, 15th and 16th requests to charge.

Record, pp, 44, 45.

After the inspection of the four car loads (the first shipped), and the first cargo, "Maid of Mist," the culls to be rejected were so few, that the Oil Company determined that it didn't pay them to inspect the heading; and therefore afterwards, the company, by its agent, Thomas H. Wheeler, agreed with Helme, for Merritt & Company, that if they would inspect the rest of the heading, when loading on cars, as closely as that they had already shipped, they would waive inspection. [Record, p. 30.] In other words, they would simply match and count; reject no pieces as culls. All pieces should be counted as acceptable under the contract, and paid for accordingly. This was agreed to by Helme (Merritt & Company); and the culling before loading on the cars, and the loading of the cars was thus strictly carried out. That such culling was satisfactory to the Oil Company, is settled beyond controversy by the fact that after these four car loads and the first vessel load were inspected, no further culls were returned in any of the bills.

Record, pp. 30, 39.

III.

RESUME'.

Having given the facts above, we are now prepared to call attention to the main facts in controversy in the court below, which are here presented by this record, for the considertion of this court.

1.

The ground of the defendant's below cause is, that he has the right to recover for a greater amount of heading than the defendant, Oil Company accounted to him, or his assigns for. It is true that the reading of the several contracts, shows limited means and distress on the part of J. J. Merritt and Merritt & Company & Helm, from which embarrassments, more or less, in their business arose. It is true that the contracts might be denominated particularly hard ones for them to comply with, but we accept the contracts as they are written, taking them as the law requires that they should be, —read and understood according to the plain import of the terms used, considered in connection with the transaction and surrounding circumstances.

The manufacturers, Merritt, Merritt & Company & Helme, placed themselves entirely in the hands of the Standard Oil Company, *by agreeing that this heading should be subject to count and inspection by the Oil Company.* It was not, as is usual, to be subject to the count and inspection of an impartial person; but they threw themselves into the hands of the Oil Company, whereby the Company could practice fraud, misjudgment, great errors or mistakes without much chance of detection. In this condition which they placed themselves, the relief which the law gives to other

should certainly not be denied to them. And we assert that this condition imposed upon the Oil Company *the moral obligation* and the legal duty to see that the count, gross and net, at Cleveland, should be *made by a competent* person, without fraud, or without any great errors or mistakes. If the Company were guilty of employing an *incompetent person*, or if the person employed was guilty of *fraud;* or made any great errors although not faudulent, *the law grants* to the opposite party relief. The difficulty in the remedy is, in establishing the *incompetency*, *the fraud* or the errors;—as the means by which these might be established, are so largely in the hands of and under the control of the Oil Company.

ERRORS IN COUNT.

DEMONSTRATION.

The *gross pieces*, as counted when being placed upon cars at Lapeer, amounted to..... *2,691,660*
Helme, record p. 28.

And the count of gross pieces made by *Bowzy*, at Cleveland, was..... ..... *2,296,160*
Bowzy, Record, p. 41.

Making a difference in gross pieces of..... . .... *395,500*

This discrepancy amounted to more than ⅛ in round numbers of the whole number of pieces shipped from Lapeer.

It amounted to more *than* 2½ *vessel loads*, averaging such loads by the number of vessels shipped.

It would amount in round numbers, to over fifty-five average car loads—making some *three trains* of loaded cars.

2.

JURY QUESTIONS.

But as these questions are purely *questions of fact* to be determined by the forum charged with that duty, the jury, that forum should be alowed the decision of that question upon the evidence adduced, if such evidence tends to establish or overthrow any of the propositions. That the employment of *incompetent inspectors*, or *fraud in inspection or counting*, would releave the maufacturers, *Merritt & Company*, from the count and inspection made by the Company, was not denied upon the trial below, and we think it will be conceded here.

And if errors creep into such count and inspection (without actual proof of incompetency or fraud) so great that the judgment of fair minded men will say that the errors cannot be accounted for, except upon the theory that there was *incompetency* or *fraud* or *gross mistake*,—then the opposite party is intitled to relief, even though fraud and incompetency cannot actually be proven by other evidence; in other words, this raises a presumption of *incompetency* or *fraud*. The effect of holding a party bound under any circumstances by a grossly erroneous count or inspection, is as unjust to the party aggrieved as though the same were tainted by fraud or incompetency. The damages are the same; and in a civil action, the law recognizes the injustice, and grants relief.

It has been held by recent authorities, that an action might be maintained for fraud, *for a false assertion or representation*, even although not known by the party making it, to have been untrue at the time; and thus the strict doctrine of

scienter has been modified by allowing the aggrieved party to recover damages—the great remedy in *civil* actions.

Converse vs. Plumrich, 14 Mich., 109.
Beebe vs. Knapp, 28 Mich. 53—75.

3.

BURDEN OF PROOF.

Conceding the fact, then, that Merritt, and Merritt & Company, by the contract, agreed that the heading should be paid for according to the inspection and count of the Oil Company; we admit that unless there was such a *great discrepancy between the actual pieces*, as shipped from Lapeer, and the count of such pieces made by the Oil Company in Cleveland, as to induce the belief on the part of the Jury (the triers of the fact), that the count in Cleveland was an erroneous one,—*grossly erroneous;* then the count of the Oil Company rendered, cannot be disputed.

4.

In presenting this question, it should be remembered that, by a subsequent contract providing for the preliminary count and inspection, on lands in Lapeer, *the title of the heading upon such count, inspection and payment of advances on certificates*, became vested in the Oil Company.

Record, p. 30, Brief, p. 3.

Such was held to be the effect of a like provision in a contract of the same Merritt with the Oil Company, in the case of Hatch vs. the Standard Oil Company, decided at the October term of this Court, 1879.

We therefore, here, for the purposes of this argument,

concede that the burden of proof was on the part of the plaintiff below, to establish such great errors in the count of gross pieces at Cleveland. But it is equally true that the Jury were charged with the duty of deciding on the weight of such evidence, and of determining if we had lifted the burden.

5.

LAPEER COUNT.

Deeming this to be the law as to the *burden of proof* the counsel for the plaintiff proceeded in the trial of the cause to make apparent this discrepancy, and to ask that this great error should be taken into consideration by the jury to determine whether the count and matching of *the Oil Company at Cleveland*, was such an one as, under all the circumstances bound the plaintiff below.

To do this he first produced the very first evidence,—the first link in the chain—to establish the fact of the careful culling, loading and counting on cars of the heading when shipped from Lapeer. The testimony given upon the trial showed that great care was taken in the methods to arrive at accuracy, the tally being marked on the car, as loaded, piece by piece then reported, recorded and shipped. Neither Merritt or Helme had any knowledge, by any statement made by the Company or its agents, or from any information given by them, of the number of *pieces of timber actually handled by them in Cleveland* by their inspector and counter. In fact they were lead to believe no such count was kept. And even upon this last trial, the Oil Company, by its

attorneys insisted that they were under no obligation to keep an account of the gross pieces.

16 Request, Record p. 45.

Conceding then, that the count of pieces at Lapeer was accurate (and which the Jury from the evidence, had a right to find)—that these pieces from the cars passed to the dock of the Central Rail Road Company in Detroit, as loaded—there, unloaded—and re-loaded upon vessels by a middle man, the shipper, Mr. Thompson; that these vessels were, on an average, less than three days in transit from Detroit to Cleveland, *where at the docks of the Oil Company, they were unloaded*; what person of fair judgment, under the proof, could account for this discrepancy, except upon the hypothesis *of fraud, incompetency*, or *gross errors* on the part of the inspector and counter of the Company at Cleveland (which fact the Jury had also a right to find from the evidence)?

CLEVELAND COUNT.

BOWZY'S EVIDENCE.

We have no means of determining about the actual number of pices—gross pieces—as made by the counter at Cleveland, except from him—Bowzy—the direct agent and employe of the Oil Company. But it did happen that this *Bowzy*, the Company's counter and matcher, was sworn on behalf of the Oil Company, in the first trial, and he there disclosed for the first time, that he had kept, or pretended to keep, a count of the actual number of pieces handled, and the gross number as he made it was thus for the first time obtained.

Bowzy's Methods.

His Inspection—Matching—Counting—Mere Guessing.

He as a witness stated that the heading was unloaded from the vessels at the dock, wheeled back some distance into the dock yard (2 feet in printed record error) and then piled in "piles or ranks," (p. 40,) and afterward when drawn from the dock (dock yard) to the factory, (over a mile) he matched every portion of the *first cargo* (Maid of the Mist) [this cargo he would have to handle to inspect and reject]—that as to other cargoes he only matched portions—he took, say "1,000 "pieces, laid them off and piled them up, and thus arrived "at matching by average." (Record p. 41), and thus guessed at the cargo's *net heading*—figured up the whole, except the first cargo, on that basis.

A greater advantage of gain to the Oil Company came by such methods—that the mere saving of handling—by their proposition and agreement *to wave inspection.*

Merritt & Co., learned for the first time from this Bowzy's testimony, given upon the first trial, his methods (as well as mistakes).

Again this heading having been unloaded and wheeled back—thus remained in "ranks" until the teamster commenced hauling (sometimes several weeks.)

Record p. 41.

NOTE.

a.

It is a notable fact that all accounts rendered by this Oil Company,—paying vessel freights—receipts from vessels—charging dockage and teaming—is all by car loads—yet when car loads were transferred to vessels, all pieces

became mingled and no longer susceptible of car load separation, as shipped from Lapeer.

It is a still more notable fact that although Bowzy testified that each vessel load was kept separate and accounts of each separately kept in his account—only made, however as the teamsters loaded and hauled—that the charges of the Oil Company for dockage and teaming is *by car load*—it does not pretend to be by *vessel* load or cargo.

How *Bowzy* could then keep and report *car loads* and not *cargoes* (each of which had a certain number of car loads), is past our comprehension and it will require further light to disclose his methods in this respect.

The following table, taken from the account [Record, pp. 53, 54] shows these dockage and teaming charges:

1875.

June 12,	Dockage and teaming			18 cars.	
" 26,	do.	do.		14 "	
" 30,	do.	do.		11 "	
July 3,	do.	do.		13 "	
" 7,	do.	do.		15 "	
" 19,	do.	do.		34 "	
" "	do.	do.		15 "	=$105 56.
" "	do.	do.		15 "	= 97 85.
" 24,	do.	do.		21 "	
" 31,	do.	do.		26 "	
Aug. 10,	do.	do.		27 "	
" "	do.	do.		24 "	
" "	do.	do.		19 "	
" "	do.	do.		27 "	
" 16,	do.	do.		46 "	
" 18,	do.	do.		10 "	
" "	do.	do.		31 "	
" "	do.	do.		20 "	

Compare then this table with that of the cargoes—car loads on each—on printed record p. 43, and the identity of car loads by cargoes is entirely lost.

And how it happens that this same Oil Company charge in this account *two item*, same number of cars and same date:

1875.

July 19, Dockage and teaming.....15 cars, $105 56
July 19, do. " .....15 cars, 97 85

Record p. 53.

At different sums they were unable to explain, and like their other proofs, disclose *errors and mistakes* which attract attention.

It also appeared upon that trial, that running through his whole account there were numerous mistakes, and which were so glaring that on the second trial the Company had its officers and agents and employes go over the whole account with a view to correct such mistakes as *Bowzy* had made, and upon such review they found the Company actually indebted to the plaintiffs by their own showing $144.34.

Record, p. 41.

This correction and number of his mistakes, 24 in number, comes from the Oil Company's agents and employes, and who can say that a still further examination of these books and accounts would not disclose actually from their own papers and documents, more numerous and greater errors? If, then, we are right in the position which we took there, and in the position which we we now take, *that this discrepancy was too great to be accounted for except upon the ground of gross mistake*, (and therefore that

the plaintiff was not bound by the Company's count,) then the jury upon all the evidence in the case had a right to find the facts and the errors as near as they could, and having found an amount—their verdict should not for that reason alone be disturbed.

Loss in Transit if Any.

Where in This Case Rests the Burden of Proof?

We do not see that this question cuts much of a figure in this case, but as the defendant below laid so
this point, and as by its 12 Reguest to Charg
and the 20th Assignment of Errors [Record
compelled to notice it here.

From evidence in a case certain *presumptions*
is evidence—from which conclusions are dr
facts.

In the amended contract between J. J. Merritt & Company, dated 1st day April, 1874, relating to the delivery on lot in Lapeer, this clause appears:

"Whereupon the delivery of said heading shall be deemed "complete, and said heading shall then become, and thence-"forth be the property of the second party," the Oil Company.

Record, p. 20—this brief, p. 3.

The title then to the heading became vested in the Oil Company before any of it was shipped, and thenceforth J. J. Merritt & Company and all others handling the heading—carrier and all—were the agents and servants of the Oil Company.

The title being thus vested, the Oil Company only could recover from carrier for loss.

Rogers vs. Phillips, 40 N. Y., 519,
523,
527,
529.

2 Kent. Com. 500.

These staves were loaded on vessels, and bills of lading made by car loads—these bills of lading—showing car loads were delivered by the masters (captains) to the Oil Company in Cleveland and receipted also by the car loads—freight paid by the Company—and thus they were reduced to the actual possession of the Oil Company upon their own premises.

Bills of landing—see form and cargoes—Record pp. 42, 43.

These receipts covered the heading by *car loads*.. 387
With the four car loads first sent through by cars..... 4

391

Making the number of car loads receipted—the same As the number of car loads shipped from Lapeer, 391.

What disinterested person then, would fail to say that *the presumption is* that every piece of *heading* shipped from Lapeer, was received by the Oil Company, upon their dock, at Cleveland—and if any were lost in *transit*—the burden is clearly thrown upon the Oil Company to show the loss.

B.

But the methods by which we attempted to arrive at the conclusion, on the trial below, of errors in the Cleveland Court were complained of, by the Oil Company, excepted to, and are here by the bill of exceptions, to be reviewed.

These exceptions and the assignments of error thereon, are so numerous that they can only be presented in groups, without going into too much elaboration. We shall, therefore, proceed to group them, according to the points to which they relate.

Of course in the effort to establish the correctness of the gross count at Lapeer, and the incorrectness of the return made, the plaintiff was compelled to resort to all the evidence

within his power admissible under the rules of law. It was therefore, competent to show in evidence any facts from which a presumption could be raised in favor of the amount of heading, and the correctness of the count at Lapeer—and against the correctness of the count at Cleveland, and the account rendered therefor. And as the Company had returned an account of four cargoes before the agreement was made to *omit culling or inspection*, it was very material to ascertain how the heading subsequently shipped, compared in width and quality, to that shipped by the four cars and upon 'the Maid of the Mist.' Therefore, the questions propounded to the witness Helme, and objected to [Record, pp. 30 and 31], were clearly competent as some proof upon the subject of the great variance of the count of pieces at Lapeer, and the account therefore returned from Cleveland. Also the questions propounded to the same witness, Helme, and objected to [Record, pp. 35 and 36], are clearly admissable for the reason that, from the evidence before then introduced, and the claims made by the counsel for the Oil Company, it was apparent that the Oil Company would insist that the rendition of the final account of the Company to *Helme*, returning what was stated to be the balance, and his acceptance of said balance and keeping the account without objection, until the suit was commenced, *estopped him and his privies, or assignees*, from raising a question of its correctness. Any evidence therefore, which tended to explain his reason for not objecting was certainly competent, in explanation of his conduct.

Hugh Coulter.—The defendants also objected to some testimony from Hugh Coulter; but we say the testimony was clearly admissable upon the subject of the discrepancy. On the cross-examination of *Coulter* [Record, p 37], he was

asked if he didn't state to different parties, that he wanted the pliantiff to recover, so that he might get his pay. The plaintiff's counsel objected, supposing the question was one intended for impeachment by showing contradictory statements, but the counsel for the defendant replied, "that he didn't intend to impeach the witness;" and yet he made no explanation why he desired the answer, or what bearing it would have upon the case. If not to impeach the witness by contradictory statements, but intended to show that he had an interest in the suit, that is a species of evidence to impeach; that is, offered to impair testimony. Therefore the statement of the counsel left it to the Judge's discretion, and the Judge was clearly right in not allowing mere frivolous or unimportant questions to be answered.

GUMMERSON.—[Record, p. 37.] The other questions propounded to this witness, and objected to and answered, were most clearly competent upon this question of variance. It related to the average width of the heading first shipped and last shipped, for comparison, and to show that the great falling off of that last shipped was unjust. To judge of such pieces was only a matter of observation, not of discretion; and any man or boy making such observation, was competent to give his opinion.

INNES.—[Record, p. 37.] The questions objected to and answered by this witness, was of the same character as that of *Helme*, to determine the comparative width and condition of the heading first and last shipped.

TAGGART.—[Record, p. 38.] The question to this witness was of the same character, and the answer on like grounds, is admissable.

VI.

BRIEF.

a.

These questions of measurement, inspection and count, are of frequent occurrence in the Courts of Michigan, where business requiring it is largely carried on. It relates to the lumber interest, the stave and heading interest, and the timber interest of the State.

We cannot so well present the law as settled upon such matters in this State as by quoting from the decision of the Court in the case of *Ortman vs. Green*, 26 Mich., 209, Id. 215, where the Court in speaking of the position taken by the counsel in the Court below uses this language:

26 Mich., 215.

"It does not seem to be supposed that there was any intentional *fraud* or misconduct in any one, but there was evidence which the plaintiff in error had the right to argue tended to prove either incompetency or mistake, or if he chose so to urge, *fraud* in the scaler. He was not allowed to rely on it except to show *fraud*. And this we think was error. There was already in the case undisputed evidence of two serious mistakes, one in the count of the logs, and one in the footings of the amounts. There could be no difference of opinion as to the materiality of further deficit, if it existed to the extent claimed, and while it was a question for the jury, it was one quite pertinent and proper whether such a difference between two scalers could be accounted for without fraud or

mistake. How many of the footings were right and how many wrong, does not appear; but such mistakes in figures render it quite possible that futher scrutiny might disclose others on the face of the bills, * * * and further on the court says:

Id. 216.

"A mistake in a purely mathematical portion of this work, "whether by misreading or wrong computation, or mismeasurment would affect the result quite as seriously as a mistake of judgment, and if it should turn out that *the variance was too great to* be reasonably referred to a mere *error of judgment* in a competent scaler, it could not fail to proceed from such a cause as would render it improper to hold any one bound by it.

Id. pp. 215 and 216.

See also

Cox vs. Prentice, 3 M. and Sel. 344.
Wedon vs. Olds, 20 Wend. 174.

Rendition of Account—Holding Without Objection Only Presumptive Evidence, Not an Estopple Against Errors.

b.

The counsel for the defendant below, insisted that as Helme received the final account—kept it—made no objection to Oil Company, as to its contents—that he and his assigns—were estopped from showing error in it; and upon the record here, the counsel for the Oil Company insist by several assignments of error, (Record p. 56) *that an iron rule of law* had shut out all questions of its correctness and finality.

But by their own admission, how quickly do they dash the jewel "*consistency*" in pieces—when upon the trial they

prove 24 errors and a balance in the plaintiff's favor of $144.34 and for which they concede the plaintiff was entitled to recover.

Record, p. 44—7th request.

Is the law—like the "Will o' the Wisp"—thus uncertain—thus unstable—now you see it—now you don't see it?

No, indeed—the law is alike a settled rule for all parties—for both sides of a controversy.

The rule that the rendition of an account—its acceptance, and retention—is but presumptive evidence of its correctness—is no more at most, than *an admission of its correctness*, is just in principle, and is well settled by authority.

Champion vs. Joslyn, 44 New York, 653,656,659.
Lockwood vs. Thorne, 18 New York, 285.
Williams vs. Glenney, 16 New York, 389. 389
Thomas vs. Hawkes, 8 Monroe, 139.
White vs. Campbell, 25 Mich., 463.
Perkins vs. Hart, 11 Wheaton, 256.

6.

CHARGE OF COURT—EXCEPTIONS TO.

We find that the exceptions to the charge of the Court, grouped, consist mostly of two divisions.

1st. Of requests that the Court should charge the jury that unless they should find that there was evidence in the case that *Bowzy*, the counter and matcher of the Company at Cleveland, was guilty of *fraud*, or that he was *an incompetent person to count and match*, that then the plaintiff was bound by his counting and matching.

2nd. That the rendition of the accounts by the Company to Merritt & Company, and the rendition of the final account enclosing a balance, as it appeared by such account, to Merritt

& Company, and *Helme's* receipt of the account, retaining said balance, and the account without objection, until the suit was commenced, operated as AN ESTOPPEL, and would not allow the plaintiff to open the question of the correctness of the account, and therefore he could not recover for any discrepancy.

We believe the above propositions cover substantially all the points made upon the charge of the Court. However numerous the requests to the Court may be to charge upon legal propositions, and however elaborate the points of counsel may be, to bring before the Court their views of the law as applicable to the whole case, the court is only bound to give such instructions to the jury as will fairly present all the points in the case for their consideration. And if the charge appears to be full and fair upon such points as should be submitted to the jury, and if it contain a correct statement of the law upon such points, then there is no cause of complaint and the judgment should not be disturbed.

a.

In opposition to the first claim of the defendant below, as grouped above, the plaintiff below insisted that the simple evidence of so *gross an error*, was a ground for relief; and that he was not compelled to show specifically either *incompetency or fraud*. Upon this point we cite again *Ortman vs. Green*, 26 Mich., 209; *Cox vs. Prentiss*, 3 M. Sel. 344; *Weadon vs. Olds*, 20th of Wendell, 174.

b.

We think upon the second proposition as to the effect of the rendition of the account, the Court below very clearly and correctly stated the law upon that point, "That the ren-

dition and acceptance of the account by *Helme*, in September, 1875, is presumptive evidence that the account is correct. The evidence is uncontradicted that *Helme* made no complaint to the defendant of the correctness of that account, but kept it in his possession for some five months, and then commenced suit. The general principel is, that when one party renders to the other an account of their mutual dealings and the other party keeps it, without objection, for a considerable time, that it should be deemed to be assented to, that it is an admission on his part that the account is correct, and *I* charge you that in this case that the acoount was kept such a time as would make it an admission on the part of *Helme* of its correctness. At the same time, *Helme* is not estopped, after all, from showing fraud or mistake in the account. There is this difference between an admission and an estoppel. If a man is estopped to claim a certain thing he is ~~essentially~~ entirely precluded from showing it, but if it be a mere admission of a certain state of facts he may explain that admission by showing that he was not fully informed, or by showing that since the admission was made he has discovered fraud or mistake in the account. Applying that to this case, *I* instruct you that the rendition of the account to *Helme*, is not an estoppel, but simply an admission on his part of the correctness of the account, and he is not precluded from showing that it is incorrect, but the burden of proof is thrown upon him, and when—as in this case—the account was kept a considerable time and no objection was made to it, the plaintiff ought to make it clearly appear to you that there was *error* or *fraud*."

Record, p. 50.

The charge upon this point is clearly within the law, as stated by our Supreme Court in

White vs. Campbell, 25 Mich., 463.
Id 468.

as follows:

"The conversion of an open account into an account stated,
"is an operation by which the parties assent to a sum as the
"correct balance due from one to the other, and whether
"this operation has been performed or not in any instance
"must depend upon the facts—

"That it has taken place may appear by evidence of an ex-
"press understanding, or of words and acts, and the necessary
"and proper inferences from them.

"When *accomplished* it does not necessarily exclude all
"inquiry into the rectitude of the account. *The parties may*
"*impeach it for fraud or mistake.*"

And the charge was also clearly within the law, as settled by this court in

Perkins vs. Hart 11 Wheat, 256.

where it is thus stated:

"If to a bill for an account the defendant plead, or in his
"answer rely upon a settled account, the plaintiff may sur-
"charge, by alleging and providing omissions in the account;
"or may *falsify* by showing errors in some of the items stated
"in it. The rule is the same in principle at law.

"A settled account is only *prima facie* evidence of its
"correctness"—It may be impeached by proof of *unfairness* or
"*mistake*, in law or in fact, and if it be confined to particular
"items of account, it concludes nothing in relation to other
"items not stated in it."

c.

In considering *this question* of rendering the account, its effect, and the correspondence of the Company with J. J.

Merritt & Company, Helme's action, and all the surrounding circumstances, it should not be forgotten that J. J. Merritt & Company were, like most men of limited means, transacting business carrying them over many months, yea, some years; that they had in their employ, no skilled book keeper, nor were they accustomed to keep books in such detail as the Oil Company; that they only kept, and only could keep at Lapeer the first great evidence, the number of pieces (gross) loaded upon the cars and shipped therefrom; and the mode and means of keeping this was so simple and so plain, that errors could not well creep in; that all else in reference to the account was in the hands of the Oil Company, its agents and servants; that no statement of the number of gross pieces upon any car load, or cargo, as made by the Company's employes at Cleveland, was ever given to Merritt & Company, or any one of them; and that the Company, on their account books kept at Cleveland, kept no account of the gross pieces, and their count of such was only disclosed, for the first time, on the first trial of this cause in the Court below, by Bowzy, their matcher and counter.

When this final account was rendered to *Helme*, the discrepancy was so glaring and far from what he considered it should be, that he at once set *Innes*, who had been employed by him and placed in charge of the loading, to gather up all the evidence from tally books, and otherwise, of the gross number of pieces; and *Innes* was enabled, from what he had kept, to make up a list of the gross pieces loaded in each car (car by car, and number as loaded), and thus to obtain the aggregate number of gross pieces shpiped. All the investigation which they were able to make went to show the gross injustice of the account rendered; the great error made (they then knew not how,) by the counter and matcher at Cleveland.

The Company had no resident representative in Michigan. It could not by the laws of the State be sued here, save by the law which authorizes the commencement of proceedings by attachment, the seizing upon any property which might be found within the precinct of the issue of the writ.

And thus the delay in taking action to right the great wrong which existed in the account, was not considered by the Jury unreasonable, and this was a question entirely within their province to determine.

And when, upon the first trial, it was discovered that *Bowzy* had kept, or pretended to keep, the gross count of all the pieces, such a great discrepancy existed in the mere mechanical counts at Lapeer and Cleveland, ~~on judgment~~, as to startle any one seeking for truth.

The questions upon the ~~first~~ last trial became narrowed to nearly the only one of discrepancy in the actual count of pieces. And in determining which count was right and which wrong, the Jury had a right, and it was their duty, to take into consideration all the facts proved, and particularly that this heading was unloaded from the vessels at the Oil Company's docks, removed from the docks to the yard, and sometimes remained a month in the same yard where heading from other States and from other vessels was piled, before *Bowzy* began to count or remove it; thus affording great chance for mistake; and the actual mistakes which he made (detected upon the former trial, and admitted upon the second trial), would challenge before any Jury, *his competency* or *his fairness*. There is no reason then, in all this record, why this judgment should, in our opinion, be dis-

turbed. We, therefore, ask that the judgment be affirmed, and that the defendant in error recover that judgment, interest and costs.

M. E. CROFOOT,

Counsel for Defendant in Error.

NOTE.—We think this case belongs to that class of cases intended to be covered by Rule No. 23, paragraph 2; and if it should so appear to this Court, we ask for the enforcement of the Rule.

This would be but slight compensation for more than four and one-half years' delay in the payment of the judgment (rendered 21st Sept., 1877), and the costs and expenses of following the case here.